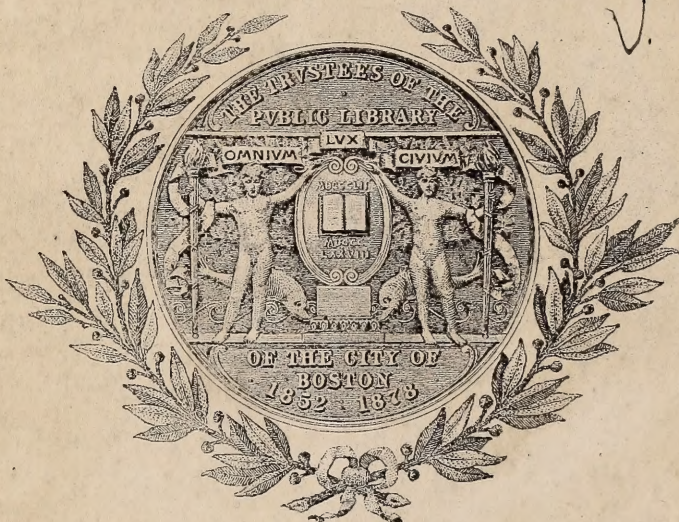







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THE
FIRST PART
OF THE

alip
Institutes of the Laws of England;

OR, A
COMMENTARY upon LITTLETON:

Not the NAME of the AUTHOR only, but of the LAW itself.

*Quid te vana juvant miserae ludibria chartæ?
Hoc lege, quod possis dicere jure meum est.*

MART.

Major hereditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

** 5660. 50*
Hæc ego grandævus posui tibi, candide lector,

Authore EDUARDO COKE, MILITE.

The FIFTEENTH EDITION;

Revised and Corrected, with further Additions of NOTES, REFERENCES,
and PROPER TABLES.

By FRANCIS HARGRAVE AND CHARLES BUTLER,
ESQUIRES, OF LINCOLN'S-INN.

Including also the NOTES of

Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM:

AND

An ANALYSIS of LITTLETON, written by an Unknown Hand in 1658-9.

London:

Printed for E. and R. BROOKE, BELL-YARD, near TEMPLE-BAR.

M,DCC,XCIV.

162

Gift of
WILLIAM D. SOHIER, ESQ..
JULY 24, 1899.

YAROL CLUON
OF THE
BIBLIOTHECA

TO THE RIGHT HONOURABLE
EDWARD, LORD THURLOW,
BARON THURLOW OF ASHFIELD,
IN THE COUNTY OF SUFFOLK,
LORD HIGH CHANCELLOR OF GREAT-BRITAIN,

THIS WORK
IS,
WITH HIS LORDSHIP'S PERMISSION,
RESPECTFULLY DEDICATED.

THE
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1622

THE

OF

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THE
EDITOR'S
ADDRESS to the PUBLIC.

THE very high and advanced price, at which the *twelfth* edition of *Sir Edward Coke's First Institute, or Commentary upon Littleton*, has been sold for a long time past, is a proof, that a *new* edition is now wanted in order to supply the public demand. This of itself may be thought a sufficient reason for offering a *new* edition; but another, and more cogent motive concurs in inducing to such a proposal; for, notwithstanding the advantages, which may have been given to the *tenth*, *eleventh*, and *twelfth* editions, there still remains an ample field for further improvements. It is not intended, by this observation, in the least to derogate from the merit of those three editions; of which the *tenth* and *eleventh* are particularly thought by some to deserve commendation, as well on account of the care and industry exerted in correcting the errors of former impressions, as on account of the knowledge and judgment shewn in the additional notes and references. But a work like *Sir Edward Coke's Commentary*, so crowded with references to other books and authorities, will ever leave room for corrections; and being written on a subject so dependant, as the law necessarily is, on the opinions of the time *present*, and so frequently undergoing changes by acts of the legislature, will continually call for additions. These considerations may suffice to evince the propriety of attempting a *new* edition; but something further is requisite to recommend *that* now offered to the public; and therefore the editor will explain the plan, on which he proposes to conduct it.

Littleton's Tenures and *Sir Edward Coke's Commentary* will be printed from the *second* edition, that being generally esteemed the most correct one of the *Commentary*; but it will be occasionally compared with the *first* and *other* editions, *all* of which have been procured for that purpose. Also the text of *Littleton* will be collated with the *Roban* edition, which was that preferred by *Sir Edward Coke*, and a still *earlier* one by *Lettou* and *Mechlinia*, which was

printed in the life-time of Littleton, or within a year after his death, and has *never yet* been made use of in any edition of the Commentary. For the use of these two most curious and scarce editions of Littleton, the editor is indebted to the kindness of one, whose name he should think it an honour to be at liberty to mention. The editor is also provided with the curious editions of Littleton by *Pynson* and *Redman*, which are the next in date to the *Roban* edition. He is possessed too of an edition in 1534 by *Rastell*, and of *most* of the *other* editions of Littleton, which are very numerous; but these latter, not being of so great authority, will seldom be consulted. It is proper to add, that the editor proposes to give the various readings of *four* or *five* of the earliest editions of Littleton, which has never been attempted before. But no various readings will be given, except where they appear to the editor *substantially* to affect the sense of the author*; and therefore the reader will not find *any* in the *first* section; the difference of the several editions, so far as regards that section, being apparently quite *immaterial*. As to *references*, those in the *first*, *second*, and *other* editions of Sir Edward Coke's Commentary before the *tenth*, having been made by Sir Edward Coke himself, will be *wholly* retained, with such corrections only of apparent mistakes as shall occur to the editor. Many of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will also be retained; it being intended only to omit such as the editor shall discover to be plainly foreign to the purpose. The editor is aware, that even some of Sir Edward Coke's own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are considered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a presumption in him to *omit any* part of the *original* work; though, in respect to the references, such a liberty is in

* This may seem not quite consistent with *sometimes* giving the word *Nota* as a various reading; but the reason of it is, that Littleton is thought by Sir Edward Coke to use the word *Nota* in a sense peculiarly significant. See Co. Lit. 22. a. —The various readings of Littleton, taken from the edition by *Letton* and *Mechlinia*, will be distinguished by *L.* and *M.* those from the *Roban* edition by *Rob.* those from *Pynson's* edition by *P.* and those from *Redman's* edition by *Red.* and if a reading should be taken from any *other* edition, it will be particularly mentioned. In *Redman's* edition there are references to cases in some of the more ancient Year Books, which it was once intended to have given as part of the various readings from *Redman*; but on re-consideration, they do not appear of sufficient consequence to be taken notice of.

very numerous instances taken in the *twelfth* edition *; and besides, he would by no means be understood to engage for an examination of *every* reference with the book cited, which is a task far greater than his other avocations will allow him to engage in †. Further, it is proposed by the editor, to give some additional references, particularly to the reports published since the *twelfth* edition; and some notes; but he avoids promising a *great* number of either, lest he should undertake more than he may hereafter be able to accomplish. However, in order to make amends for the smallness of the number of new notes and references ‡, great care shall be taken in the choice of them; and they shall be so expressed, as clearly to shew whether they tend to confirm, to question, to contradict, or to illustrate the doctrine advanced in the text; a distinction very requisite for the convenience and information of the reader, though in new editions of law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* references are not distinguished from Sir Edward Coke's; but in this present edition it is thought proper to acquaint the reader, which belong to him, and which to his respective editors; and for that purpose, the additional references taken from the *tenth*, *eleventh*, and *twelfth* editions will be inclosed between *parentheses*;

* The editor has not yet found such a liberty taken in any edition, except the *twelfth*; but in *that* the omission of lord Coke's references is very frequent indeed, and he doubts whether many pages can be found without instances of it. In several pages he finds *twenty* or *thirty* references omitted, and in some *forty* or *fifty*. The truth of this will appear by examining fol. 4. b. and 5. a. of the *twelfth* edition with the same folios in any preceding one. The editor would not be so early in making this observation, if it was not with a view to shew, how unaccountable it is, that notwithstanding this *suppression* of a great part of the authorities, on which lord Coke founds his opinions, the *twelfth* edition should sell for *six pounds*, whilst the price of some of the more early editions, though they contain the *whole* of the original work, and therefore are infinitely more valuable, is scarce as many *shillings*.

† It is necessary to mention this, lest the *continuation* of those mistaken references by lord Coke, which are to be found in all the former editions, should be imputed to the inattention of the editor of the present edition, and as a negligence not consistent with his engagements to the public. The editor may add, that many of the mistakes are of such a kind, that to correct them, and to refer to the books or authorities intended, would exceed his utmost diligence and power.

‡ At first the editor doubted, whether it would be in his power to give the time necessary for writing *many* notes and references; but this first number of the work, he hopes, will convince his readers, how anxious he is to furnish a great number; and he will exert himself to the utmost in order to continue the work on the same enlarged plan. Having engaged in the undertaking, he is resolved at all events to make great sacrifices, rather than suffer it to languish in his hands.

and those, with the notes by the editor of this edition, with the various readings of Littleton, will be referred to by figures, and placed at the bottom of the page. Such a discrimination is a justice due to those from whom the references proceed, particularly to Sir Edward Coke; and, at the same time, must be a satisfaction to the reader.—The *eleventh* and *twelfth* editions contain some notes and additions, shewing the alterations in the laws since the time of Sir Edward Coke, which were printed separately at the end of the work. This has been found inconvenient; and therefore, in the present edition, they will be placed in the margin of the book where they respectively apply; except such of them as the editor shall find improper to be retained, or such as shall consist of extracts from acts of parliament, which, being too long for marginal insertion, will be omitted; and it is hoped, that the omission of those extracts will not be disapproved of, as a short reference to the statutes themselves, with an intimation that they have altered the law, will be substituted, which will equally answer the purpose of apprizing the reader*.—In all the former editions, the French text of Littleton's Tenures, and the whole of Sir Edward Coke's Commentary, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be used, which, it is presumed, will be both an agreeable and useful alteration in the printing; the *black* letter being generally deemed less pleasing, and more fatiguing to the sight, than either of the others.—In respect to the *Index* to the First Institute, it is at present intended, that it shall be the same as in the *eleventh* and *twelfth* editions; the editor thinking that having already undertaken so much, it would be imprudent to pledge himself still further, by entering into any engagement for making additions to the Index.

To the *ninth* and *subsequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail and Mainprize*; to the *tenth*, *eleventh*, and *twelfth* was added his *Copyholder*; and to the two latter the *Treatise* of the *Old Tenures* was also added. All these tracts will be given in the present edition; but with this difference, that the *Reading* on the *Statute of Fines* will be in *English*, and the *Treatise* of *Old Tenures*, instead of being in French only, will

* The notes added in the 11th and 12th editions, exclusive of extracts from acts of parliaments, are so few, that all put together scarce amount to so much as the additional matter given by the editor of the present edition in his first number; and he is now doubtful, whether he shall retain any of them in their original form. However, if he should, they shall be distinguished in the manner above mentioned.

be accompanied with the *Old English* translation, as printed at the end of the *first* edition of the *Terms of the Law*. The *original French* of the *Old Tenures* is continued on account of the great antiquity of the book; but in the printing, the *black* letter will not be used *.

Besides Sir Edward Coke's *Tracts* and the *Old Tenures*, the present edition will have an *Analysis* of *Littleton*, from a manuscript, dated 1658-9, which has never yet been printed. This *Analysis* is a methodical summary of *Littleton*, containing not only a *general* view of the *whole* work, but also a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciously and ingeniously executed, and worthy of publication; and he hopes that it will not be deemed an improper addition, more especially as it will neither occasion the suppression of any other matter, or increase the price of the work to the purchasers.

To the whole will be prefixed a new *Preface*, by the editor of the present edition. In this *Preface*, he proposes, in the *first* place, to consider the merit of *Littleton's Tenures* and *Sir Edward Coke's Commentary*, and to point out the excellencies of each; in the *next* place, to give a *particular* account of the several editions of both; and *lastly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's First Institute, now submitted as a candidate for the public favour and encouragement; nor shall any exertion within the power of the editor be wanting to deserve them. He foresees that *great pains* and *labour* will be necessary to the effecting a due performance of his engagements, and that *little fame* can be expected from the most successful execution of an undertaking so humble as scarce to exceed that of a *mere* editor. But still he looks forward with pleasure. His veneration for the names of *Littleton* and *Coke*; his admiration of their writings; his persuasion that an attentive contemplation of them, by the improvement it must produce, will be its own reward; and his zeal to be instrumental in exhibiting them to the public eye, pure, genuine, and undisguised, and with as many advantages as a faithful and industrious

* [Towards the conclusion of this work it was found adviseable wholly to omit the republication of these tracts, being already printed in a separate octavo volume.]

editor can bestow: these were the considerations, which *chiefly* prompted him to commence the undertaking; and these, he trusts, will continue to animate him till it is completed. If by perseverance and an unremitting ardor, the editor should succeed in his endeavours, he will then have the pleasing satisfaction of reflecting, that his labours have been useful, instructive, and agreeable to himself, and, at the same time, not wholly unprofitable or unacceptable to the community*.

FRA. HARGRAVE.

* From some late circumstances there is reason to apprehend, that the editor's situation in respect to the work he has undertaken is greatly misunderstood. The *intire conduct* of the edition is intrusted to him; but he is not the *proprietor* of it; nor is he personally interested in the *loss* or *profits*, which may attend the publication. His engagements to the *proprietors* of the edition are of a very *limited* kind. Those he has entered into with the *public* are very *extensive*. For the *former* engagements, a benefit, which was offered without any application on his part, is secured to him, independently of the event of the publication; but he can truly say, that it was the *least* of the considerations, which induced him to undertake the work, and that he would still cheerfully renounce it, if by so doing he could render the work more valuable to the *public*. For his *latter* engagements he desires no other reward, than the approbation of those for whose benefit his labours are intended.—The editor finds, that several respectable persons have expressed surprize at publishing the work by *Numbers*. This mode of publication, though, in itself, not liable to any great exception, has, by the *abuse* of it, become rather disreputable in the *appearance*; and therefore when it was first proposed to the *Editor* by the *proprietors* of the Edition, he objected to it. But on considering the great and immediate expences incident to their undertaking, and the other reasons urged by them, they were found too cogent to be resisted; and the editor was the more easily induced to acquiesce, because he found the proprietors most ready to put themselves to every expence which he recommended, for the purpose of rendering the work more acceptable to the public.

A D D R E S S

FROM

*Mr. HARGRAVE,*ANNOUNCING HIS RELINQUISHMENT OF THIS
WORK, &c.

MR. HARGRAVE, the editor of so much of the NEW EDITION of COKE UPON LITTLETON as has been published, at length finds his relinquishment of the undertaking in an unfinished state quite unavoidable. Numerous and severe are the sacrifices, which he has heretofore made in order to accomplish the original proposals in their fullest extent. To this moment he feels the effect of those sacrifices; nor is he likely ever to conquer wholly the disadvantage already incurred from them. But it might be improper and disgusting to enter into particulars upon this head, which in its nature is too personal to the editor to be interesting to others. He will therefore be content with generally declaring, that his situation is become such, as to render him unequal to any longer sustaining the weight of those labors, which he has ever found incident to the work upon the extended plan of annotation adopted by him from the commencement of the edition, though certainly not belonging to it from the very limited professions and terms originally held out to the Public. It is from personal considerations, and in his own defence, that he thus adverts to having passed the bounds of the first undertaking in the actual execution: because, as he feels himself open to censure, from those indisposed to yield to indulgent construction, for having done LESS than he promised, he too plainly sees the necessity of striving to soften such censure by the recollection of his having also done MORE. In truth, had he not rashly exceeded the limits first prescribed, by wandering into the wide field of annotation, it is most probable, that the WHOLE of the edition would have been finished long ago, and consequently that the editor would not now have to mortify himself by apologizing for executing only ONE HALF OF

IT.

ADDRESS FROM MR. HARGRAVE.

IT*. This to be sure is the most favourable point of view for the editor; its tendency being to shew, that his excess of zeal to render the edition VALUABLE has been one cause of his finally leaving it IMPERFECT. If it shall be thought proper by others kindly to receive the editor's apology in this form, it will qualify his unhappiness at the painful and trying moment of separation from a very favourite work before its advancement into maturity. Should a less indulgent construction be applied to the editor, it will deeply wound feelings already enough exercised; but from a consciousness of being open to some degree of exception for what rigid observers may stile an unfeasible abandonment of a work so long promised to be compleated, he must in that case kiss the rod, and submit himself to the severity of animadversion with a patient humility.

It is no small consolation to Mr. Hargrave to accompany this recital of his failure in the edition, with information of its having fallen into the hands of a professional gentleman † of such a description, as to warrant expecting from him a quick and able execution of the remainder of the undertaking. As Mr. Hargrave understands, his successor is prompted to engage in the work by an extreme partiality for it, and having been in the habit of studying and annotating on the COKE UPON LITTLETON. He also possesses the important advantage of having long practised in the conveyancing line; to which, as Mr. Hargrave can speak from his own experience as a barrister in that branch of the law, a familiarity with the law of real property, and consequently with the writings of LITTLETON and COKE, is peculiarly essential. These and other considerations claim from Mr. Hargrave much beyond a hope, that the depending edition of COKE UPON LITTLETON will gain considerably by change of the editor; and that the new adventurer in this arduous undertaking will stamp the remainder of the edition with much greater value than could be reached by any efforts however vigorous from the original editor.

FRA. HARGRAVE.

Boswell-Court, 18 Jan. 1785.

* The COKE upon LITTLETON, exclusive of the Preface and Index, consists of 393 folios, or 786 pages. Mr. HARGRAVE has proceeded in the new edition and actually published to the end of folio 190 or page 380, which is exactly 13 folios short of one-half of the work.

† CHARLES BUTLER, of Lincoln's-Inn, Esquire.

P R E F A C E

TO THE

THIRTEENTH EDITION.

THE reputation of LITTLETON'S TREATISE on TENURES is too well established, to require any mention of the praises which the most respectable writers of our country have bestowed on it. No work on our laws has been more warmly or generally applauded by them. But some foreign writers have spoken of it in very different terms. At the head of these is Hottoman, who, in his Treatise "De Verbis feudalibus," thus expresses himself: "Stephanus Pasquierius excellenti vir ingenio, et inter Parisienses causidicos dicendi facultate præstans, libellum mihi Anglicanum Littletonium dedit, quo Feudorum Anglicorum Jura exponuntur, ita inconditè, absurdè, et inconcinnè scriptum, ut facile appareat, verissimum esse, quod Polydorus Virgilius, in Anglicâ Historiâ, de Jure Anglicano testatus est, stultitiam in eo libro, cum maximi, et calumniandi studio, certare." This passage from Hottoman is cited without any disapprobation in the 6th edition of Struvius's Bibliotheca Juris Selecta; but in the 8th edition of that work (Jenæ 1756) it is qualified by the words "singularia sed parum apta sunt, quæ Franciscus Hottomanus profert, &c." Gatzert, in his "Commentatio Juris exotici Historico-Literaria de Jure communi Angliæ," (Gottingen 1765) gives the following account of Littleton and his works: "Æqualis huic, tempore, ast doctrinâ famâ et meritis longe superior fuit, immortalitatem nominis apud posteros, si quis unquam merito consecutus, Thomas Littleton; a quo juris studium inchoant hodie Angli, plane ut suum olim, ab edicto Prætoris et XII Tabulis, Romani. Hic igitur Ictus, absolutis disciplinis academicis, jura patria mox cum plausu in Interiori Templo Londinensi, quæ paulo ante ibidem didicerat, aliquantum temporis profectus, ab Henrico VI. ad officium primo judicandi in curia Palatii vocatus est. Advocati deinde ac procuratoris regii (king's serjeant) muneris a° 1455 admotus, judexque porro ambulatorius factus provincialis, (justice of assizes) et tandem inter judicantes communium placitorum curiæ a° 1466 ab Edoardo IV. relatus, dignus habitus est, qui multum ampliori, quam solebat, stipendio ordinisque adeo Balnei honoribus a° 1475 donaretur. Vivere desinit a° 1533 *.—Unicum librum scripsit,

General observations on Littleton's Tenures.

" sed

* This is a strange mistake, as Littleton died in 1482.

“ sed qui plurimum loco est, si spectas eruditionem et argumentum. In eo
 “ excussit doctrinam juris patrii difficillimam, gravissimam, usque quoti-
 “ diano maxime commendabilem; qualia nempe, et quotuplicia sint feuda
 “ Angliæ, quænam eorum jura, obligationes, præstationes atque servitia.
 “ In usus quidem Richardi filii, et aliorum quorundam ad explicanda illis
 “ capita aliquot opusculi DE TENURIS ab incerto auctore Edoardi III.
 “ ævo conscripti. Gallicè primo fuit compositus, mox Gallicè deinde
 “ sæpius et Anglice, mox vero Gallicè et Latine, typis excusus. Vi-
 “ ginti quinque servitiorum feudalium genera statuit, quæ tribus libris, in
 “ quos omne opus dispergitur, persecutus est. Titulum hunc esse voluit
 “ OF TENURES. In anno editionis originariæ a Cokio qui aº 1533 ponit
 “ dissentiunt, eamque circa aº 1477 non diu post inventam typographiæ
 “ artem prodiisse, valde vero similiter statuunt Biographi Brit. vol. V. qui
 “ cum Nicolsone, p. 233. late etiam de argumento imprimis, et divi-
 “ sione libri agunt. Editio duodecima 1738 lucem vidit. Cokius in
 “ præfatione sui ad Littletonum Commentarii, de quo mox differam, inter
 “ plura quæ auctorem concernunt ejusque opus XV. ICTOS nominis
 “ magni alios appellat, qui eodem tempore floruerunt. Exhibet præte-
 “ rea imaginem Littletonianam. Cæterum liber ob methodi brevitatem,
 “ argumentandi subtilitatem, atque dictorum ordinem, laudem omnino
 “ meretur; sed nec minus fatendum est, adeo sæpissime obscuritati bo-
 “ num hominem studuisse, ut ænigmata legum maluisse, quam præcepta,
 “ tradere videatur. Multa jam immutata esse, plura inveterata atque
 “ obsoleta, non urgeo. Interim communis ICTorum Anglorum hæc vox
 “ est perfectissimum et absolutissimum hoc opus esse ex omnibus quæ un-
 “ quam in ulla scientia humana scripta sint quæ unquam proferre potuerit
 “ hominis ingenium; non intelligere qui culpent. Ita parum abest, quin
 “ credant, falli eum fuisse nescium!”

The English reader will probably be surprised at these accounts of Littleton. Hottoman has the reputation of great learning, and elegant writing; but he has been blamed very generally for the contemptuous language with which he speaks even of the writers of his own civil law.

Gravina, while he mentions his endowments, both natural and acquired, with admiration, censures his abuse of other judicial writers with great severity. Speaking of him, he says, “ Non modo in Accursianis et Bar-
 “ tolinis interpretibus reprehendendis, sed in ipso Triboniano perpetuo
 “ exagitando, collectam totâ vitâ opinionem verecundiæ atque modestiæ,
 “ prorsus amisit,” Grav. lib. 1. §. 179.

Cujas also was supposed to allude to him in a passage of his works, where having occasion to mention the writers who find fault with the disposition

disposition and arrangement of the civil law, he says, "*Quam illi sunt imperitissimi! nam neque quid ars sit sciunt; neque artem digestorum aut principia certa juris ulla perceperunt unquam; suaves tamen ad ridendi materiam.*"

But Hottoman's general disposition to abuse, is not the only circumstance by which his virulent censure of Littleton may be accounted for. Full of the doctrines of the feudal laws of his own country, he might expect to find doctrines of a similar nature in Littleton, without adverting that the greatest part of Littleton's work treats of the subordinate and practical part of the laws of England, which, like that of every other country, is in a great degree peculiar to itself, and bears but a remote analogy to those of other countries. It is allowed, that the feudal polity of the different countries of Europe is derived from the same origin; that there is a marked similitude in their principal institutions; and a singular uniformity in the history of their rise, perfection, decline, and fall. But the more we go from a view of their general constitutions and governments to a view of their particular laws and customs, the less this similitude and uniformity are discoverable.

Thus the history of every country where the feudal laws have prevailed, while it presents us, on the one hand, with an account of the many restraints imposed by them upon alienation, and of the many methods which have been taken to make property unalienable, presents us, on the other, with an account of the different arts which have been used to elude those restraints, and to make property free. This is as observable in the law of England, as it is in the law of any other country.

But the mode by which it has been effected in England, is peculiar to England. In other countries, where a liberty of alienation has been introduced, it has rested on a kind of compromise with the lord, by paying him a certain fine; and a kind of compromise with the relations of the feudatory, by allowing them a right of redemption, commonly called the "*jus retractus.*" But the steps by which a free alienation of property has obtained ground in England are very different. In England an unlimited freedom of aliening socage and military land was soon allowed; the practice of sub-infeudation was soon abolished; the alienation of lands was restrained by the introduction of conditional fees, and afterwards by the introduction of estates tail; entails from their first establishment were greatly discountenanced by the courts of justice, and they were eluded by the doctrines of discontinuance and warranty. In the course of time, a fine was made a bar to the claims of the issue in tail, and a common recovery to the claims both of the issue and of those in remainder and reversion. Most of these circumstances are peculiar to the History of England.

England. Hence an English reader, who opens the writings of the foreign feudists with an expectation of finding there something applicable to the practical parts of the law of his own country, respecting the alienation of landed property, will be greatly disappointed. He will find the most positive prohibition of aliening the fee without the consent of the lord : he will find very nice and subtle disquisitions of what amounts to an alienation : he will find that, in some countries, the lord's consent still continues a favour ; that in others it is a right, which the tenant may claim on rendering a certain fine. In short, he will find the works of foreign feudists filled with accounts of the "*jus retractus*," or "*droit de rachat*," the "*retraite lignager*," and the "*droit des lods et des ventes*;" but he will hardly find the words, or any thing equivalent to the words, conditional fee, estate tail, discontinuance, warranty, fine, or recovery, in the sense in which we use them.

The same may be observed on the doctrine of conditions. According to the strict principles of the feudal law, no conditions could be annexed to a fief, except the implied conditions to which every fief was subject, from the obligation of service on the part of the tenant, and the obligation of protection on the part of the lord. Every fief to which any express or conventional condition was annexed, was, from that very circumstance, ranked among improper fiefs. But fiefs in England were at all times susceptible of every kind of condition.

It would be easy to pursue these observations through the subsequent chapters of Littleton's Treatise. If even we consider the subject on a more extensive scale, we shall find some circumstances peculiar to the English law, which must necessarily occasion a very essential and marked difference between the constitution and forms of the government of England and the constitution and forms of the government of other countries. Such are the universal conversion of allodial lands into fiefs ; the total abolition of sub-infeudation ; the freedom of alienation of estates in fee-simple ; and the limited and dependant situation of our nobility, when contrasted with the situation of the high nobility of foreign countries : all these are peculiar in a great measure to our laws. It follows, that our writers must be silent on many of the topics which fill the immense volumes of foreign feudists ; and they, from the same circumstance, must be equally silent on many of the subjects which are discussed by our writers. That this is so, will appear to every person conversant with the ancient writers on our laws, who will give a cursory look at the writers on the feudal laws of other countries. Nothing in this respect can be more different than those parts of the writings of Bracton, Britton, Fleta, Littleton, sir Edward Coke, and sir William Blackstone, which treat of landed property, and the books of the fiefs, Cujas's Commentary upon them, the

various treatises on feudal matters collected in the 10th and 11th volumes of the "*Tractatus Tractatum* *," Du Moulin's *Commentarii* in "*prores très Titulos Consuetudinis Parisiensis* †," or the more modern treatises of Monsieur Germain Antoine Guyot ‡, and Monsieur Hervé §.

These observations are offered with a view to account for the contemptuous manner in which the two foreign writers, cited above, speak of Littleton. They may also account, in some measure, for a circumstance which has been a matter of some surprize, the total silence of sir Edward Coke on the general doctrine of fiefs. It is obvious, how extremely desirous his lordship is upon every occasion to give the reasons of the doctrines laid down by him; and what forced, and sometimes even puerile reasons he assigns for them; yet though so much of our law is supposed to depend upon feudal principles, he never once mentions the feudal law.

* The title of this work is, "*Oceanus Juris, sive Tractatus Tractatum Juris universi, duce et auspice Gregorio 13. in unum congesti, a Fr. Zilletti.*" There are two editions of this work, both printed at Venice; the first in 1548, the second in 1584. The first edition is in 16 tomes, generally bound in 12 volumes; the second is in 18 tomes, generally bound in 29 volumes. The arrangement of this work is greatly admired; but it is not a work in great request, even in those countries which are governed by the civil law.

† This is usually the first treatise printed in the general collection of his works. An abridgement of it was published in 1773 by Mr. Henrion de Pensée, under the title of "*Traité des Fiefs de Du Moulin, Analyté et Conferé avec les autres Feudistes.*"

‡ The title of this work is, "*Traité des Matieres Feodales, tant pour le Pays Coutumier que pour celuy du Droit écrit, avec des Observations. Par Germain Antoine Guyot. Paris, 1738. and Ann. Suiv. 7 vol. in 4to.*"

§ "*Theorie des Matieres Feodales et Censuelles, ou l'on developpe la Chaine de ces Matieres, dans un Ordre et sous un Aspect, qui en facilitent l'Intelligence, y repandent de nouvelles Lumieres, et menent a des Definitions neuves des Contrats de Fiefs, & de Cens. Par Monsieur Hervé. 1785. Paris. 6 vol. in 8vo.*" The first volume of this work contains an historical account of the rise, progress, and present state of fiefs in France. In 1756, Monsieur Bouquet published one volume of a work entitled, "*Le Droit Public de la France.*" In his preface to it he promised to continue and complete it in two more volumes, but he is since dead, without having published any part of the continuation; a circumstance greatly to be regretted by the lovers of this kind of learning, as the first volume is executed in a most masterly manner. The English reader will perhaps find it the most interesting and instructive work that has yet appeared on the subject in the French language. If the reader wishes to pursue his researches on the subject, he will find some assistance from a small work printed at Frankfort in 1779, entitled, "*Joannes Adami Koppii Historia Juris Scientiæ Romanæ Feodalis Privatæ ac Publicæ. 1 vol. 8vo.*"

“ I do marvel many times, says sir Henry Spelman, that my lord
 “ Coke, adorning our law with so many flowers of antiquity and foreign
 “ learning, hath not (as I suppose) turned aside into this field, i. e. feudal
 “ learning, from whence so many roots of our law have, of old, been
 “ taken and transplanted. I wish some worthy would read them dili-
 “ gently, and shew the several heads from whence those of ours are taken.
 “ They beyond the seas are not only diligent, but very curious in this
 “ kind ; but we are all for profit and ‘ *lucrando pane,*’ taking what we
 “ find at market, without enquiring whence it came.” But this com-
 plaint is open to observation.

There is no doubt but our laws respecting landed property are suscep-
 tible of great illustration from a recurrence to the general history and
 principles of the feudal law. This is evident from the writings of lord
 chief baron Gilbert, particularly his treatise of Tenures, in which he has
 very successfully explained, by feudal principles, several of the leading
 points of the doctrines laid down in the works of Littleton and sir Edward
 Coke, and shewn the real grounds of several of their distinctions, which
 otherwise appear to be merely arbitrary. By this he reduced them to
 a degree of system, of which till then they did not appear susceptible.
 His treatise, therefore, cannot be too much recommended to every person
 who wishes to make himself a complete master of the extensive and va-
 rious learning contained in the works of those writers. The same may
 be said of the writings of sir William Blackstone. Much useful informa-
 tion may be derived also from other writers on these subjects.

But the reader, whose aim is to qualify himself for the practice of his
 profession, cannot be advised to extend his researches upon those subjects
 very far. The points of feudal learning, which serve to explain or illus-
 trate the jurisprudence of England, are few in number, and may be
 found in the authors we have mentioned.

It is not impossible but further enquiries might lead to other interesting
 discoveries. But the knowledge absolutely necessary for every person to
 possess who is to practise the law with credit to himself and advantage
 to his clients, is of so very abstruse a nature, and comprehends such
 a variety of different matters, that the utmost time which the com-
 pass of a life allows for the study, is not more than sufficient for the
 acquisition of that branch of knowledge only ; still less will it allow
 him to enter upon the immense field of foreign feudality. It were greatly
 to be wished that some gentleman, possessed of sufficient time, talents, and
 assiduity, would dedicate them to this study. Those who have read the
 late doctor GILBERT STEWART’S “ *View of Society in Europe, in its*
 “ *Progress from Rudeness to Refinement,*” will lament that he did not
 pursue his researches. From such a writer, a work on this subject might
 be

be expected, at once entertaining, interesting, and instructive; but such a work is not to be expected from a practising lawyer. Whatever may be the energies of his mind, his industry, his application and activity, he will soon feel, that to gain an accurate and extensive knowledge of the law, as it is practised in our courts of justice, requires them all. Thus, on the one hand, the student will find an advantage in some degree of research into feudal learning; on the other, he will feel it necessary to bound his researches, and to leave, before he has made any great progress in them, the Book of Fiefs, and its commentators, for Littleton's Tenures and sir Edward Coke's Commentary*.

If it were proper to enter into a further defence of Littleton, it might be done by observing, that it must be a matter of great doubt, whether Hottoman ever saw, or Gatzert more than saw, the work they so severely censure. Hottoman, if he had read it, *might* think it inelegant and absurd; but he *could not* think it malicious, or indicative of a disposition to slander. Gatzert says Littleton specifies twenty-five kinds of feudal services. It is probable, that by services he meant tenures: if he did, it is obvious that he confounded those chapters of Littleton which treat of the nature of the feudal estate, with those chapters which treat of the nature of the feudal tenure: in every other sense the word Services, applied in this manner to Littleton's work, is without a meaning.—Besides, he mentions Latin editions of Littleton, when no edition in that language ever appeared.

In fact, were it not for the general observations to which they naturally give rise, neither the criticism of Hottoman nor that of Gatzert would have been noticed.

When doctor Cowell, in his Law Dictionary, cited the passage in question from Hottoman, it raised universal indignation, and he expunged it from the later editions of his book. It certainly was unjust to impute it as a crime to doctor Cowell, that he inserted this citation in his work; but the manner in which it was received is a striking proof of the high estimation in which Littleton's Treatise was held.

The reputation of SIR EDWARD COKE'S COMMENTARY is not inferior to that of the work which is the subject of it. It is objected to it, that it is defective in method. But it should be observed, that a

General observations
on sir Edward Coke's
Commentary.

* In the present (*fifteenth*) edition an attempt is made to continue Mr. Hargrave's enchoate note on the Feudal Tenures, and to render it as useful as the nature of the subject admits to the practitioner and the student.

want of method was, in some respects, inseparable from the nature of the undertaking. During a long life of intense and unremitted application to the study of the laws of England, sir Edward Coke had treasured up an immensity of the most valuable common-law learning. This he wished to present to the public, and chose that mode of doing it, in which, without being obliged to dwell on those doctrines of the law which other authors might explain equally well, he might produce that profound and recondite learning which he felt himself to possess above all others. In adopting this plan, he appears to have judged rationally, and consequently ought not to be censured for a circumstance inseparable from it.

It must be allowed that the style of sir Edward Coke is strongly tinged with the quaintness of the times in which he wrote; but it is accurate, expressive, and clear. That it is sometimes difficult to comprehend his meaning, is owing, generally speaking, to the abstruseness of his subject, not to the obscurity of his language.—It has also been objected to him, that the authorities he cites do not in many places come up to the doctrines they are brought to support. There appears to be some ground for this observation. Yet it should not be forgot, that the uncommon depth of his learning, and acuteness of his mind, might enable him to discover connections and consequences which escape a common observer.

It is sometimes said, that the perusal of his Commentary is now become useless, as many of the doctrines of law which his writings explain are become obsolete; and that every thing useful in him may be found more systematically and agreeably arranged in modern writers. It must be acknowledged, that when he treats of those parts of the law which have been altered since his time, his Commentary partakes, in a certain degree, of the obsolescence of the subjects to which it is applied; but even where this is the case, it generally happens that the doctrines laid down by him serve to illustrate other parts of the law which are still in force. Thus, — there is no doubt but the cases which now come before the courts of equity, and the principles upon which they are determined, are extremely different in their nature from those which are the subject of sir Edward Coke's researches. Yet the great personages who have presided in those courts, have frequently recurred to the doctrines laid down by sir Edward Coke, to form, explain, and illustrate their decrees. Hence, though portions charged upon real estates, for the benefit of younger children, were not known in Littleton's time, and not much known in the time of sir Edward Coke; yet on the points which relate respecting the vesting and payment of portions, no writings in the law are more frequently or more successfully applied to than sir Edward Coke's

Coke's Commentary on Littleton's Chapter of Conditions. It may also be observed, that notwithstanding the general tenor of the present business of our Courts, cases must frequently occur which depend upon the most abstruse and intricate parts of the ancient law. Thus the case of *Jacob v. Wheate* led to the discussion of escheats and uses as they stood before the statute of Henry VIII. and the case of *Taylor v. Horde* turned on the learning of disseisins.

But the most advantageous and, perhaps, the most proper point of view in which the merit and ability of sir Edward Coke's writings can be placed, is by considering him as the centre of modern and ancient law. —The modern system of the law may be supposed to have taken its rise at the end of the reign of king Henry VII. and to have assumed something of a regular form about the latter end of the reign of king Charles II. The principal features of this alteration are, the introduction of recoveries; conveyances to uses; the testamentary disposition by wills; the abolition of military tenures; the statute of frauds and perjuries; the establishment of a regular system of equitable jurisdiction; the discontinuance of real actions; and the mode of trying titles to landed property by ejectment. There is no doubt, but, during the above period, a material alteration was effected in the jurisprudence of this country: but this alteration has been effected, not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now sir Edward Coke's Commentary upon Littleton is an immense repository of every thing that is most interesting or useful in the legal learning of ancient times. Were it not for his writings, we should still have to search for it in the voluminous and chaotic compilation of cases contained in the Year-books; or in the dry, though valuable Abridgments of Statham, Fitzherbert, Brooke, and Rolle. Every person, who has attempted, must be sensible how very difficult and disgusting it is, to pursue a regular investigation of any point of law through those works. The writings of sir Edward Coke have considerably abridged, if not entirely taken away, the necessity of this labour.

But his writings are not only a repository of ancient learning; they also contain the outlines of the principal doctrines of modern law and equity. On the one hand, he delineates and explains the ancient system of law, as it stood at the accession of the Tudor line; on the other, he points out the leading circumstances of the innovations which then began to take place. He shews the different restraints which our ancestors imposed on the alienation of landed property, the methods by which they were eluded, and the various modifications which property received after

the free alienation of it was allowed. He shews, how the notorious and public transfer of property by livery of seisin was superseded, by the secret and refined mode of transferring it, introduced in consequence of the statute of uses. We may trace in his works the beginning of the difuse of real actions; the tendency in the nation to convert the military into socage tenures; and the outlines of almost every other point of modern jurisprudence. Thus his writings stand between, and connect the ancient and modern parts of the law, and by shewing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another.

Account of the editions
of Littleton without the
Commentary.

It has not yet been settled, and perhaps cannot now be settled, with any degree of precision, when the first EDITION of LITTLETON's work was printed. Sir Edward Coke's mistakes respecting the Rohan edition, are pointed out in the note taken from the 12th edition to that part of his Preface. Doctor Middleton, in his Account of Printing in England, conjectures the edition by J. Lettou and W. Machlinia, to have been printed in 1481, and that it is the first edition. This makes the printing of the book to have been within six or seven years after Caxton's introduction of the art into England, and within twenty-four years after the first invention of it. Dr. Middleton's conjecture is supported by the concurrent circumstance of the time when those printers appear to have been in partnership; and no other edition bears evidence of a prior title to antiquity. Another edition of nearly equal pretensions to precedence with the Lettou and Machlinia edition, has lately appeared from the library of the late William Bayntun, esq. It has remained hitherto undescribed, and was probably unknown to all who have undertaken to notice the several editions of this work. At the end it is said to be printed by Machlinia alone, then living near Fleet-bridge: from which, and other circumstances, it is clearly distinguishable from the former edition. The letter used in printing it is less rude, and more like the modern English black letter, than the letter used in the joint edition of Lettou and Machlinia, and the abbreviations are much less numerous. These circumstances afford some, though but a faint ground to suppose it posterior in date to the former. Mr. Hargrave has both these editions. In 1766, Mons. Houard, an Avocat in the Parliament of Normandy, and Conseiller Echevin of the town of Dieppe, published at Rouen, in two volumes, the text of Littleton, with a French interpretation, notes, a glossary, and Pieces Justificatives. Many editions of Littleton in French and English only have been published in small octavo, twelves, sixteens, and twenty-fours. They are all of them very inaccurate. The French edition in 1585 is the first in which the sections are numbered. An edition in French and English, in double columns, with a table of the principal matters, was printed in duodecimo in 1671. Considering the universal estimation in which Littleton's work

is held, and that it generally is the first work put into a student's hand, it is very singular, that since the editions by Letton and Machlinia, and the Rohan edition, no correct edition of it without the Commentary has yet been published. The reader will bear with pleasure, that Mr. Hargrave has it in contemplation to favour the public with such an edition, and to print it in such a manner as will make it a typographical curiosity.

The first EDITION of SIR EDWARD COKE's COMMENTARY upon Littleton was published in his life-time, in 1628: it is very incorrect. The second edition was printed in 1629, and is supposed to have been revised by the author. The subsequent editions, to the eighth inclusively, seem to have been printed from the second, without much variation. The ninth edition includes sir Edward Coke's Reading on Fines, and his Treatise on Bail and Mainprize. To the tenth edition are added, the Complete Copyholder, with many references. In the eleventh edition the book intitled the Olde Tenures is inserted. At the end, both of the edition of Littleton by Letton and Machlinia, and of that by Machlinia only, Littleton's work is called the "Tenores Novelli," to distinguish it (it is presumed) from the Treatise of "Olde Tenores." The eleventh edition has also several notes and additions, tending principally to shew the alteration of the law since the time of Littleton and his commentator. The twelfth and last edition was published in 1738. Some observations upon it may be found in Mr. Hargrave's Address to the Public on his undertaking the present edition. An Abridgement of sir Edward Coke's Commentary was published in 1714, by Mr. Serjeant Hawkins; short but pointed observations are occasionally introduced in it, to explain the principles of the old law, and the alterations made in it by subsequent statutes.

Edition of Littleton
with sir Edw. Coke's
Commentary.]

Mr. Hargrave began the PRESENT EDITION, by publishing it in Numbers. Soon after his publication of the First Number, he was favoured with lord chief justice Hale's manuscript notes. By an advertisement prefixed to the Second Number, he informed the public that they were very numerous, as far as the Chapter of Knight Service; that there were few on the subsequent parts of the work; that for the communication of them, he was indebted to the liberal spirit of a noble lord *, who, he observed, had ever distinguished himself as a zealous encourager of undertakings having the least tendency to promote science and learning; that in the original, some of the notes were in Latin, but most of them

Present edition.

* The present Earl of Hardwicke.

PREFACE TO THE

in Law-French; and that it was thought most convenient to give the latter in a literal English translation. Upon the publication of the Second Number, Mr. Hargrave received from sir William Jones an account of some few various readings from two English manuscripts of Littleton's Tenures. By an advertisement prefixed to the Third Number he informed the public, that both of these manuscripts were in the public library at Cambridge, being marked D d 11. 60. and M m 52.; that the first was written on vellum, and was imperfect at the beginning, and in the Chapter of Warranty; and that the second, which seemed to be the most valuable, was written on paper, and had only one leaf torn, and that its antiquity appeared from the following note in the first page:

Iste liber emptus fuit in cæmeterio Sti. Pauli

London, 27th die Julii, anno regis E. 4ti. 20mo. 10s. 6d.

that this date shewed that the manuscript was of Littleton's time, July 20. E. 4. being in 1481, which was the year before Littleton's death; that in referring to the manuscripts, that in vellum would be distinguished by Vell. MS. and that in Paper by Paper MS. With these assistances Mr. Hargrave completed that part of the edition which is executed by him. He then relinquished the work, and by an Advertisement, (which immediately precedes this Preface) he informed the public of it, and of the present editor's undertaking to continue the work.

Soon after the publication of this Advertisement, the present editor, through the obliging interference of John Holliday, esq. of Lincoln's-Inn, with the executors of the will of the late sir Thomas Parker, was favoured with a copy of the notes of lord chancellor Nottingham and lord Hale upon this work. The following account is given of them in a note in sir Thomas Parker's own hand-writing:

" The notes to this book, in my hand-writing (except one note in folio
" 26. b. and some modern cases), were transcribed from a copy of the
" lord chancellor Nottingham's manuscript notes, in the margin of his
" lord Coke's Commentary upon Littleton, which copy was made for the
" use of his son Heneage Finch, esq. solicitor-general, afterwards earl of
" Aylesford, and is now in the possession of the honourable Mr. Legge, to
" whose favour I am indebted for these notes.

" The notes in a different hand-writing were transcribed from a copy
" of lord chief-justice Hale's MSS. notes in the margin of Coke upon
" Littleton, presented by lord Hale to the father of Philip Gybbon, esq.
" which copy was made for the use of the honourable Charles Yorke,

" esq.

“ esq. his Majesty’s solicitor-general. The book in which the notes are in
 “ the hand-writing of lord Hale, is now in the possession of Mr. Gybbon;
 “ and the book from which these notes were transcribed by the favour of
 “ Mr. Yorke, is now in his possession.

“ T. PARKER, 1758.”

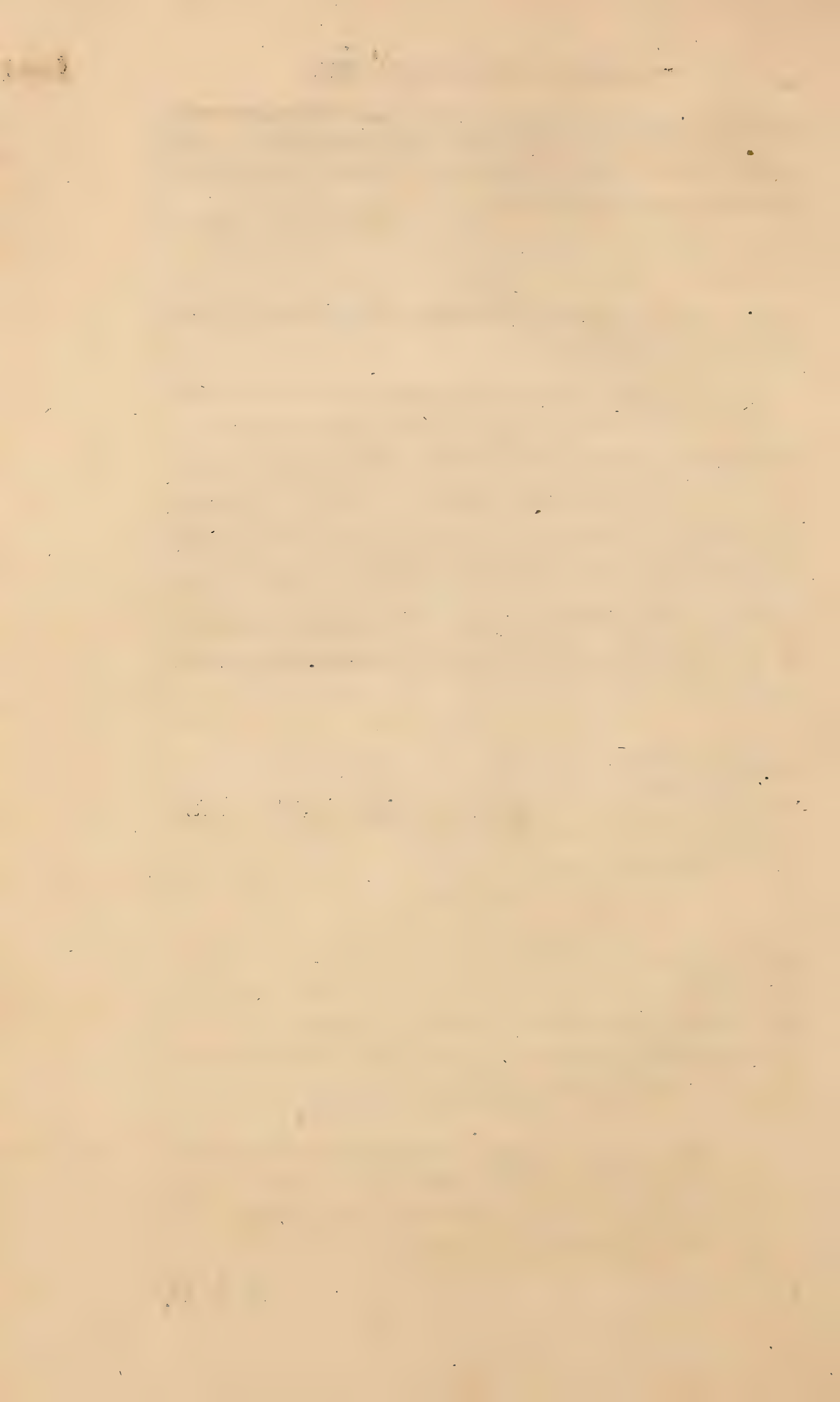
Under these circumstances the THIRTEENTH EDITION has been completed in its present form.

When it became generally known that Mr. Hargrave had relinquished the work, the present Editor engaged in it; but he did not engage in it while there was the slightest probability of its being undertaken by any other person: and even then, he would not have engaged in it, if by doing so he incurred any obligation of completing Mr. Hargrave’s undertaking in *all* its parts. He thought, an *imperfect execution* of the remaining part of the work would be more agreeable to the public than *none*; that to present them with the remaining part of the text of Littleton and his Commentator, with *some* references, and *some* notes, would be an acceptable offering to them. No other person appeared with any, and the present editor’s performance does not prevent the exertions of any future adventurer.

LINCOLN’S-INN,

Nov. 4, 1787.

CHARLES BUTLER.



D E O,
P A T R I Æ,
T I B I,

Proœmium.

OUR author, a gentleman of an ancient and a fair-descended family de Littleton, took his name of a town so called, as that famous chief-justice sir John de Markham, and divers of our profession, and others, have done.

The name and degree
of our author.

Thomas de Littleton, lord of Frankley, had issue Elizabeth his only child, and did bear the arms of his ancestors, viz. argent a chevron between three escalop-shells sable. The bearing hereof is very ancient and honourable; for the senators of Rome did wear bracelets of escalop-shells about their arms, and the knights of the honourable order of St. Michael in France do wear a collar of gold in the form of escalop-shells at this day. Hereof much more might be said, but it belongs unto others.

His arms.

Instituted by Lewis
the Eleventh, king of
France, 9. E. 4. 1469.

With this Elizabeth married Thomas Westcote esquire, the king's servant in court, a gentleman anciently descended, who bare argent, a bend between two cotises sable, a bordure engrayled gules, bezanty.

Thomas Westcote.

But

But she being fair, and of a noble spirit, and having large possessions and inheritance from her ancestors de Littleton, and from her mother, the daughter and heir of Richard de Quatermains, and other her ancestors (ready means in time to work her own desire), resolved to continue the honour of her name (as did the daughter and heir of Charleton, with one of the sons of Knightly, and divers others), and therefore prudently, whilst it was in her own power, provided by Westcote's assent before marriage, that her issue inheritable should be called by the name of de Littleton. These two had issue four sons, Thomas, Nicholas, Edmund, and Guy, and four daughters,

Our author bore his mother's surname.

Thomas the eldest was our author, who bare his father's christian name Thomas, and his mother's surname de Littleton, and the arms de Littleton also; and so doth his posterity bear both name and arms to this day.

Camden.
 "The just shall flourish like the palm-tree, and spread abroad like the cedar in Libanus." Psal. xcii. 11.

Camden, in his Britannia, saith thus: Thomas Littleton, alias Westcote, the famous lawyer, to whose Treatise of Tenures the students of the common law are no less beholden, than the civilians to Justinian's Institutes.

[*] The best kind of quartering of arms.

The dignity of this fair-descended family de Littleton hath grown up together and spread itself abroad by matches, with many other ancient and honourable families, to many worthy and fruitful branches, whose posterity flourish at this day, and quartereth many fair coats, and [*] enjoyeth fruitful and opulent inheritances thereby.

He was of the Inner-Temple, and read learnedly upon the statute of *W. 2. De donis conditionalibus*, which we have. He was afterward called *ad statum et grad' servientis ad legem*, and was steward of the court of Marshalsey of the king's household, and for his worthiness was made by king *H. 6.* his serjeant, and rode justice of assize the Northern Circuit,

which

which places he held under king *E. 4.* until he, in the sixth year of his reign, constituted him one of the judges of the court of common pleas, and then rode Northamptonshire Circuit. The same king, in the 15th year of his reign, with the prince, and other nobles and gentlemen of ancient blood, honoured him with the knighthood of the Bath.

Mich. 34. H. 8. fol. 3. a.
Judge of the Common
Pleas, Rot. Pat. 6. E. 4.
part. 1. m. 15.

Knight of the Bath,
15. E. 4.

He compiled this book when he was judge, after the fourteenth year of the reign of king *E. 4.* but the certain time we cannot yet attain unto, but (as we conceive) it was not long before his death, because it wanted his last hand; "for that tenant by *elegit*, statute-merchant, and staple, "were in the table of the first printed book, and yet he "never wrote of them *."

When he wrote this
book.
14. E. 4. tit. Garranty §

Litt. Sect. 692. 729. §
74^o.

Our author, in composing this work, had great furtherance in that he flourished in the time of many famous and expert sages of the law. [*a*] Sir Richard Newton, [*b*] sir John Prisot, [*c*] sir Robert Danby, [*d*] sir Thomas Brian, [*e*] sir Pierce Arden, [*f*] sir Richard Choke, [*g*] Walter Moyle, [*h*] William Paston, [*i*] Robert Danvers, [*k*] William Afcough, and other justices of the court of common pleas: and of the king's-bench, [*l*] sir John June, [*m*] sir John Hody, [*n*] sir John Fortescue, [*o*] sir John Markham, [*p*] sir Thomas Billing, and other excellent men flourished in his time.

The deceases of his
contemporaries.

- [*a*] He died 27. H. 6.
- [*b*] He died 39. H. 6.
- [*c*] Died 11. E. 4.
- [*d*] Died 16. H. 7.
- [*e*] Died 7. E. 4.
- [*f*] Overlived our author.
- [*g*] Survived him also.
- [*h*] Died 23. H. 6.
- [*i*] Survived our author.
- [*k*] Died 33. H. 6.
- [*l*] Died 18. H. 8.
- [*m*] Died 20. H. 6.
- [*n*] Removed 1. E. 4^o
- [*o*] Removed 8. E. 4.
- [*p*] Died 21. E. 4.

And of worldly blessings I account it not the least, that in the beginning of my study of the laws of this realm, the

* That Littleton did intend to write of those tenancies, is plain from the 291st and 324th Sections; but it may be justly questioned whether the fact alledged by my lord Coke, to support his opinion, be true; because in the copy of the Rohan edition, now in Lincoln's-Inn Library, and in that at this time in the booksellers custody, the Table mentions nothing concerning these tenancies; nor does it seem probable that there ever was any other table, both the copies appearing on the nicest examination to be complete. *Note to the 11th edition.—See also Note on Sect. 241. of the present edit.*

courts of justice, both of equity and of law, were furnished with men of excellent judgment, gravity, and wisdom. As in the chancery, sir Nicholas Bacon, and after him sir Thomas Bromley. In the exchequer-chamber, the lord Burghley, lord high treasurer of England, and sir Walter Mildmay, chancellor of the exchequer. In the king's bench, sir Christopher Wray, and after him sir John Popham. In the common pleas, sir James Dyer, and after him sir Edmund Anderson. In the court of exchequer, sir Edward Saunders, after him sir John Jeffery, and after him sir Roger Manwood, men famous (amongst many others) in their several places, and flourished, and were all honoured and preferred by that thrice noble and vertuous queen Elizabeth of ever blessed memory. Of these reverend judges, and others their associates, I must ingenuously confess, that in her reign I learnt many things, which in these Institutes I have published: and of this queen I may say, that as the rose is the queen of flowers, and smelleth more sweetly when it is plucked from the branch, so I may say and justify, that she by just desert was the queen of queens, and of kings also, for religion, piety, magnanimity, and justice; who now by remembrance thereof, since Almighty God gathered her to himself, is of greater honour and renown than when she was living in this world. You cannot question what rose I mean; for take the red or the white, she was not only by royal descent and inherent birth-right, but by roseal beauty also, heir to both.

Queen Elizabeth.

And though we wish by our labours (which are but *cunabula legis*, the cradles of the law) delight and profit to all the students of the law in their beginning of their study (to whom the First Part of the Institutes is intended), yet principally to my loving friends, the students of the honourable and worthy societies of the Inner-Temple and Clifford's-Inn, and of Lion's-Inn also, where I was some time reader. And yet of them more particularly to such as have
been

Inner-Temple.
Clifford's-Inn.
Lion's-Inn.

been of that famous university of Cambridge, *alma mater*. And to my much honoured and beloved allies and friends of the county of Norfolk, my dear and native country; and to Suffolk, where I passed my middle age; and of Buckinghamshire, where in my old age I live. In which counties, we, out of former collections, compiled these Institutes. But now return we again to our author.

He married with Johan, one of the daughters and co-heirs of William Burley, of Broomscroft-castle, in the county of Salop, a gentleman of ancient descent, and bare the arms of his family, argent, a fess checkie or and azure, upon a lion rampant sable, armed gules; and by her had three sons, sir William, Richard the lawyer, and Thomas.

His marriage.

His issue.

In his life-time, he, as a loving father and a wise man, provided matches for these three sons, in virtuous and ancient families, that is to say, for his son sir William, Ellen, daughter and coheir of Thomas Welsh esquire, who by her had issue Johan his only child, married to sir John Aston of Tixal, knight: and for the second wife of sir William, Mary the daughter of William Whittington esquire, whose posterity in Worcestershire flourish to this day. For Richard Littleton his second son, to whom he gave good possessions of inheritance, Alice, daughter and heir of William Winsbury of Pilleton-Hall in the county of Stafford esquire, whose posterity prosper in Staffordshire to this day. And for Thomas his third son, to whom he gave good possessions of inheritance, Anne, daughter and heir of John Bottreaux esquire, whose posterity in Shropshire continue prosperously to this day. Thus advanced he his posterity, and his posterity, by imitation of his virtues, have honoured him.

The re-establishment of his posterity, by the matches of his three sons with virtue and good blood.

He gave possessions of inheritance to his younger sons for their better advancement.

He made his last will and testament the 22d day of August, in the twenty-first year of the reign of king Edward

His last will.

ward

His executors, his
supervisor.

ward the fourth, whereof he made his three sons, a parson, a vicar, and a servant of his, executors : and constituted supervisor thereof, his true and faithful friend, John Alcock, doctor of law, of the famous university of Cambridge, then bishop of Worcester ; a man of singular piety, devotion, chastity, temperance, and holiness of life ; who, amongst other of his pious and charitable works, founded Jesus College in Cambridge ; a fit and fast friend to our honourable and vertuous judge.

His age.
His departure.

He left this life in his great and good age, on the 23^d day of the month of August, in the said twenty-first year of the reign of king Edward the fourth : for it is observed for a special blessing of Almighty God, that few or none of that profession die *intestatus et improles*, without will, and without child ; which last will was proved the 8th of November following, in the Prerogative Court of Canterbury, for that he had *bona notabilia* in divers diocesses. But yet our author liveth still *in ore omnium jurisprudentium*.

1. H. 7. fol. 27.
21. H. 7. fol. 32. b.

Littleton is named in 1. H. 7. and 21. H. 7. Some do hold, that it is no error either in the reporter or printer ; but that it was Richard the son of our author, who in those days professed the law, and had read upon the statute of W. 2. *quia multi per malitiam*, and [*] unto whom his father dedicated his book : and this Richard died at Pilleton-Hall in Staffordshire, in 9. H. 8.

W. 2. cap. 11.
[*] See Littleton,
Sect. 749.

His sepulchre.

The body of our author is honourably interred in the cathedral church of Worcester, under a fair tomb of marble, with his statue or portraiture upon it, together with his own match, and the matches of some of his ancestors, and with a memorial of his principal titles ; and out of the mouth of his statue proceedeth this prayer, *Fili Dei miserere mei*, which he himself caused to be made and finished in his life time, and remaineth to this day. His wife Johan, lady Littleton,

Littleton, survived him, and left a great inheritance of her father, and Ellen her mother, daughter and heir of John Grendon esquire, and other her ancestors, to sir William Littleton her son.

This work was not published in print, either by our author himself, or Richard his son, or any other, until after the deceases both of our author and of Richard his son. For I find it not cited in any book or report, before sir Anthony Fitzherbert cited him in his *Natura Brevium*; who published that book of his *Natura Brevium* in 26. H. 8. Which work of our author, in respect of the excellency thereof, by all probability should have been cited in the reports of the reigns of E. 5. R. 3. H. 7. or H. 8. or by St. Jermyn in his book of the Doctor and Student *, which he published in the three and twentieth year of H. 8. if in those days our author's book had been printed. And yet you shall observe, that time doth ever give greater authority to works and writings that are of great and profound learning, than at the first they had. The first impression that I find of our author's book was at Roan in France, by William de Tailier (for that it was written in French) *ad instantiam Richardi Pinson*, at the instance of Richard Pinson, the printer of king H. 8. before the said book of *Natura Brevium* was published; and therefore upon these and other things that we have seen, we are of opinion, that it was first printed about the four and twentieth year of the reign of king H. 8. since which time he had been commonly cited, and (as he deserves) more and more highly esteemed †.

When this work was published.

F. N. B. 212. c.

Note.

When this work was first imprinted.

He

* This book appears to have been first published by J. Raftell, 1523. Ames.

† This opinion of my lord Coke's, concerning the time of the first impression of Littleton's Tenures, although it hath been followed by sir William Dugdale, in his *Origines Juridicales*, and by bishop Nicholson, in his *Historical Library*, is certainly erroneous; for it appears by two copies now in the bookseller's custody, that they were printed twice at London in the year 1528, once by Richard

His picture.

He that is desirous to see his picture, may in the churches of Frankley and Hales-Owen see the grave and reverend countenance of our author, the outward man; but he hath left this book, as a figure of that higher and nobler part,

Richard Pynson, and again by Robert Redmayne; and that was the nineteenth year of the reign of H. 8. To determine certainly when the Rohan edition was published, is almost impossible; and before any conjectures can be offered on that subject, 'twill be necessary to consider how conclusive the arguments his lordship draws from our author's not being cited as authority in the books he mentions may be; it either proves what his lordship uses it for, or else that Littleton's authority was not then so well established as 'tis now (for which he gives us here a very good reason): and that this last is true, the aforesaid editions do sufficiently evince, for their titles and conclusions run thus: "Littleton's Tenures, newly and most truly corrected." And in the end, *Explicitum Tenores Littletoni cum alterationibus eorundem et additionibus novis, necnon cum aliis non minus utilioribus*: nay, these very additions are incorporated into the book itself, nor are they distinguished by any mark from the original. The weakness of this argument will further appear, if it should be applied to the discovering the time my lord Coke's Commentary on Littleton was first published, for this was not cited as authority for some time after its publication. The old editions abovementioned, Pynson's and Le Talleur's name, and the manner Littleton is printed in at Rohan, seem to be the only means of discovering what we seek. From those editions we may collect, not only that the Rohan impression is older than the year 1528, but also by what occurs in the beginning and end of them, that there had been other impressions of our author. From Pynson's name at the end of the Rohan edition, it may be concluded that he would not have engaged his friend William Le Talleur to have printed Littleton at Rohan, had he ever before printed any books in French; and that he printed an Abridgment of the Statutes, part of which is in French, in the year 1499, appears by one of those books now in the same person's custody. Statham's Abridgment has his name to it, but there is no date, yet it being printed with the same types, and in the same manner, Littleton was at Rohan, and as it is a larger book, it is highly probable 'twas printed some time after the publication of Littleton's Tenures, and that Pynson's success in the lesser undertaking induced him to venture on the greater; which in those days was the work of two or three years. William Le Talleur printed a Chronicle of the Dutchy of Normandy, as appears by his name and cypher at the end thereof, and the date in the beginning in the year 1487. The book itself is printed without any title-page, initial letter of the chapters, number of the leaves or year, and in a character much resembling writing, and with such abbreviations as are used in manuscripts: all which 'tis well known to those who have seen many old books, are undoubted proofs of a book's being printed when that art was in its infancy. Upon the whole it may certainly be concluded, that the book was printed some years before 1487; because the abovementioned Chronicle, which hath not so much marks of antiquity, was printed in that year; and from what has been observed concerning the manner 'tis printed in, it will be thought by those who are versed in ancient books, to have been published ten years before that time. *Note to the 11th Edition.*

that

that is, of the excellent and rare endowments of his mind, especially in the profound knowledge of the fundamental laws of this realm. He that diligently reads this his excellent work, shall behold the child and figure of his mind, which the more often he beholds in the visual line, and well observes him, the more shall he justly admire the judgment of our author, and increase his own. This only is desired, that he had written of other parts of law, and especially of the rules of good pleading, (the heart-string of the common law) wherein he excelled; for of him might the saying of our English poet be verified:

The figure of his mind.

Thereto he could indite and maken a thing;
There was no wight could pinch at his writing:

Chaucer.

so far from exception, as none could pinch at it. This skill of good pleading, he highly in this work commended to his son, and under his name to all other students sons of his law. He was learned also in that art, which is so necessary to a compleat lawyer; I mean of logick, as you shall perceive by reading of these Institutes, wherein are observed his syllogisms, inductions, and other arguments; and his definitions, descriptions, divisions, etymologies, derivations, significations, and the like. Certain it is, that when a great learned man (who is long in making) dieth, much learning dieth with him.

Good pleading.

Logick.

Seneca.

That which we have formerly written, that this book is the ornament of the common law, and the most perfect and absolute work that ever was written in any humane science; and in another place, that which I affirmed and took upon me to maintain against all opposites whatsoever, that it is a work of as absolute perfection in its kind, and as free from error, as any book that I have known to be written of any humane learning, shall to the diligent and observing reader of these Institutes be made manifest, and we by them (which is but a Commentary upon him) be

The commendation of his work.

deemed to have fully satisfied that, which we in former times have so confidently affirmed and assumed. His greatest commendation, because it is of greatest profit to us, is, that by this excellent work, which he had studiously learned of others, he faithfully taught all the professors of the law in succeeding ages. The victory is not great to overthrow his opposites, for there never was any learned man in the law, that understood our author, but concurred with me in his commendation: *Habet enim justam venerationem quicquid excellit*; for whatsoever excelleth hath just honour due to it. Such as in words have endeavoured to offer him disgrace, never understood him, and therefore we leave them in their ignorance, and wish that by these our labours they may know the truth and be converted. But herein we will proceed no further, for *Stultum est absurdas opiniones accuratius refellere*. It is meer folly to confute absurd opinions with too much curiosity.

Cicero.

Aristotle.

And albeit our author in his Three Books cites not many authorities, yet he holdeth no opinion in any of them, but is proved and approved by these two faithful witnesses in matter of law, authority and reason. Certain it is, when he raiseth any question, and sheweth the reason on both sides, the latter opinion is his own, and is consonant to law. We have known many of his cases drawn in question, but never could find any judgment given against any of them, which we cannot affirm of any other book or edition of our law. In the reign of our late sovereign lord king James of famous and ever blessed memory, it came in question upon a demurrer in law, Whether the release to one trespasser should be available or no to his companion? Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his companions, gave judgment according to the opinion of our author, and openly said, that they owed so great reverence to Littleton, as they

Note.

Mitch. 3. Jac. in
communi banc. inter
Cock & Illours.

they would not have his case disputed or questioned: and the like you may find in this Part of the Institutes. Thus much (though not so much as his due) have we spoken of him; both to set out his life, because he is our author, and for the imitation of him by others of our profession.

We have in these Institutes endeavoured to open the true sense of every of his particular cases, and the extent of every of the same, either in express words, or by implication; and where any of them are altered by any latter act of parliament, to observe the same, and wherein the alteration consisteth. Certain it is, that there is never a period, nor (for the most part) a word, nor an &c. but affordeth excellent matter of learning. But the module of a preface cannot express the observations that are made in this work, of the deep judgement and notable invention of our author. We have by comparison of the late and modern impressions with the original print, vindicated our author from two injuries: First, from divers corruptions in the late and modern prints, and restored our author to his own: Secondly, from all additions and encroachments upon him, that nothing might appear in his work but his own*.

What is endeavoured by these Institutes.

Our hope is, that the young student, who heretofore meeting at the first, and wrestling with as difficult terms and matter, as in many years after, was at the first discouraged as many have been, may, by reading these Institutes, have the difficulty and darkness both of the matter, and of the terms and words of art in the beginning of his study, facilitated and explained unto him, to the end he may proceed in his study chearfully and with delight; and therefore I have termed them Institutes, because my desire is, they should institute and instruct the studious, and guide

The benefit of these Institutes.

Wherefore called Institutes.

* In this Edition several material passages of the author are restored, by collating the text as published by Lord Coke with the more antient printed copies by Lettoun and Machlinia, Pynson, Redman, &c. as also with several antient MSS.

him in a ready way to the knowledge of the national laws of England.

Wherefore published
in English.

This Part we have (and not without precedent) published in English, for that they are an introduction to the knowledge of the national law of the realm; a work necessary, and yet heretofore not undertaken by any, albeit in all other professions there are the like. We have left our author to speak his own language, and have translated him into English, to the end that any of the nobility or gentry of this realm, or of any other estate or profession whatsoever, that will be pleased to read him and these Institutes, may understand the language wherein they are written.

Regula.

36. E. 3. cap. 5.

I cannot conjecture that the general communicating of these laws in the English tongue can work any inconvenience, but introduce great profit, seeing that *Ignorantia juris non excusat*, Ignorance of the law excuseth not. And herein I am justified by the wisdom of a parliament; the words whereof be, "That the laws and customs of this realm the rather should be reasonably perceived and known, and better understood by the tongue used in this realm, and by so much every man might the better govern himself without offending of the law, and the better keep, save and defend his heritage and possessions. And in divers regions and countries, where the king, the nobles, and other of the said realm have been, good governance and full right is done to every man, because that the laws and customs be learned and used in the tongue of the country:" as more at large by the said act, and the purview thereof may appear: *Et neminem oportet esse sapientiores legibus*, No man ought to be wiser than the law.

Regula.

And true it is, that our books of reports and statutes in ancient times were written in such French as in those times

times was commonly spoken and written by the French themselves. But this kind of French that our author hath used, is most commonly written and read, and very rarely spoken, and therefore cannot be either pure, or well pronounced. Yet the change thereof (having been so long customed) should be without any profit, but not without great danger and difficulty: for so many ancient terms and words drawn from that legal French are grown to be *vocabula artis*, vocables of art, so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed.

Our author's kind of French.

In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in other liberal sciences, you shall meet with a whole army of words, which cannot defend themselves *in bello grammaticali*, in the grammatical war, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin.

36. E. 3. ub. supr.

This work we have called "The First Part of the Institutes," for two causes: First, for that our author is the first book that our student taketh in hand: Secondly, for that there are some other Parts of Institutes not yet published, (viz.) The Second Part, being a Commentary upon the statute of *Magna Charta*, Westm. 1. and other old statutes. The Third Part treateth of criminal causes and pleas of the crown: which Three Parts we have, by the goodness of Almighty God, already finished. The Fourth Part we have purposed to be of the jurisdiction of courts: but hereof we have only collected some materials towards the raising of so great and honourable a building. We have, by the goodness and assistance of Almighty God, brought this twelfth work to an end: in the Eleven Books of our Reports we have related the opinions and judgments of others; but herein we have set down our own.

Wherefore called the First Part.

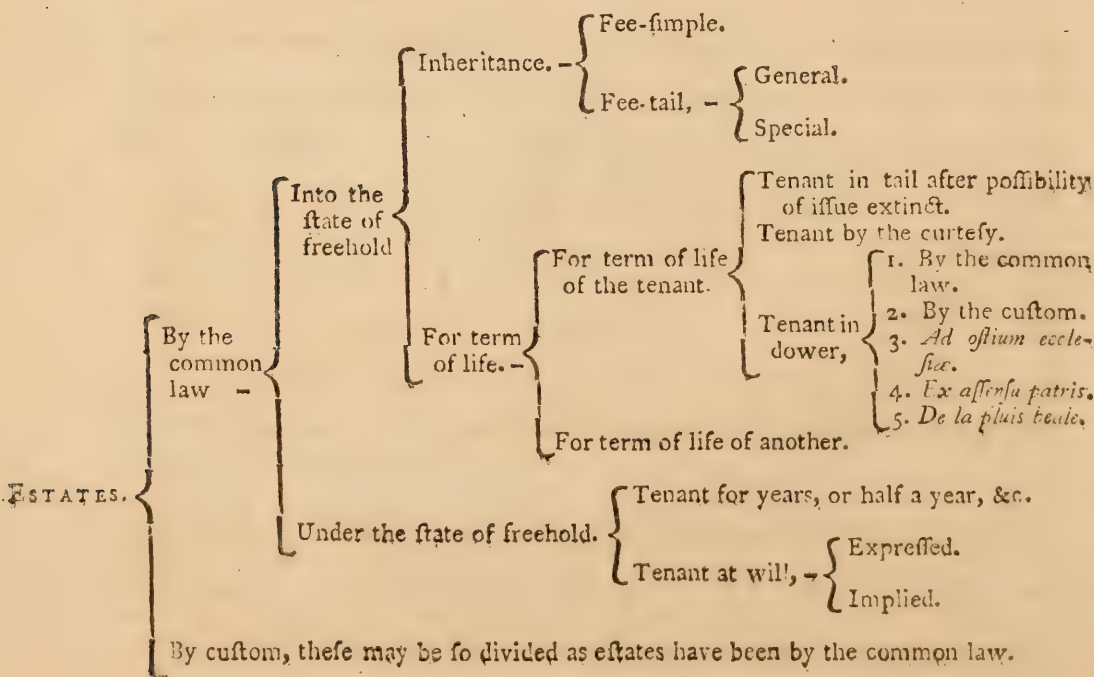
Lib. Sap. cap ix.
verf. 4. 10.

Before I entered into any of these Parts of our Institutes, I acknowledging mine own weakness and want of judgement to undertake so great works, directed my humble suit and prayer to the Author of all goodness and wisdom, out of the Book of Wisdom ; *Pater et Deus misericordiæ, da mihi sedium tuarum assistricem Sapientiam ! Mitte eam de cœlis sanctis tuis et à sede magnitudinis tuæ, ut tecum sit et tecum laboret, ut sciam quid acceptum sit apud te !* “ Oh “ Father and God of mercy, give me Wisdom, the assist- “ ant of thy seats ! Oh fend her out of the holy heavens, “ and from the seat of thy greatness, that she may be pre- “ sent with me, and labour with me, that I may know “ what is pleasing unto thee.” *Amen.*

Bracton.

Our author hath divided his whole work into Three Books. In his First he hath divided estates in lands and tenements, in this manner : for *res per divisionem melius aperiuntur.*

A FIGURE of the DIVISION of POSSESSIONS.



Our author dealt only with the estates and terms above-said : somewhat we shall speak of estates by force of certain statutes, as of statute-merchant, statute-staple, and *elegit*, (whereof our author intended to have written) [*] and likewise to executors to whom lands are devised for payment of debts, and the like.

[*] See the first remark to the Preface.

I shall desire, that the learned reader will not conceive any opinion against any part of this painful and large volume, until he shall have advisedly read over the whole, and diligently searched out, and well considered of the several authorities, proofs and reasons which we have cited and set down for warrant and confirmation of our opinions throughout this whole work,

Regula.
Incivile est parte una perspecta, tota re non cognita, de ea judicare.

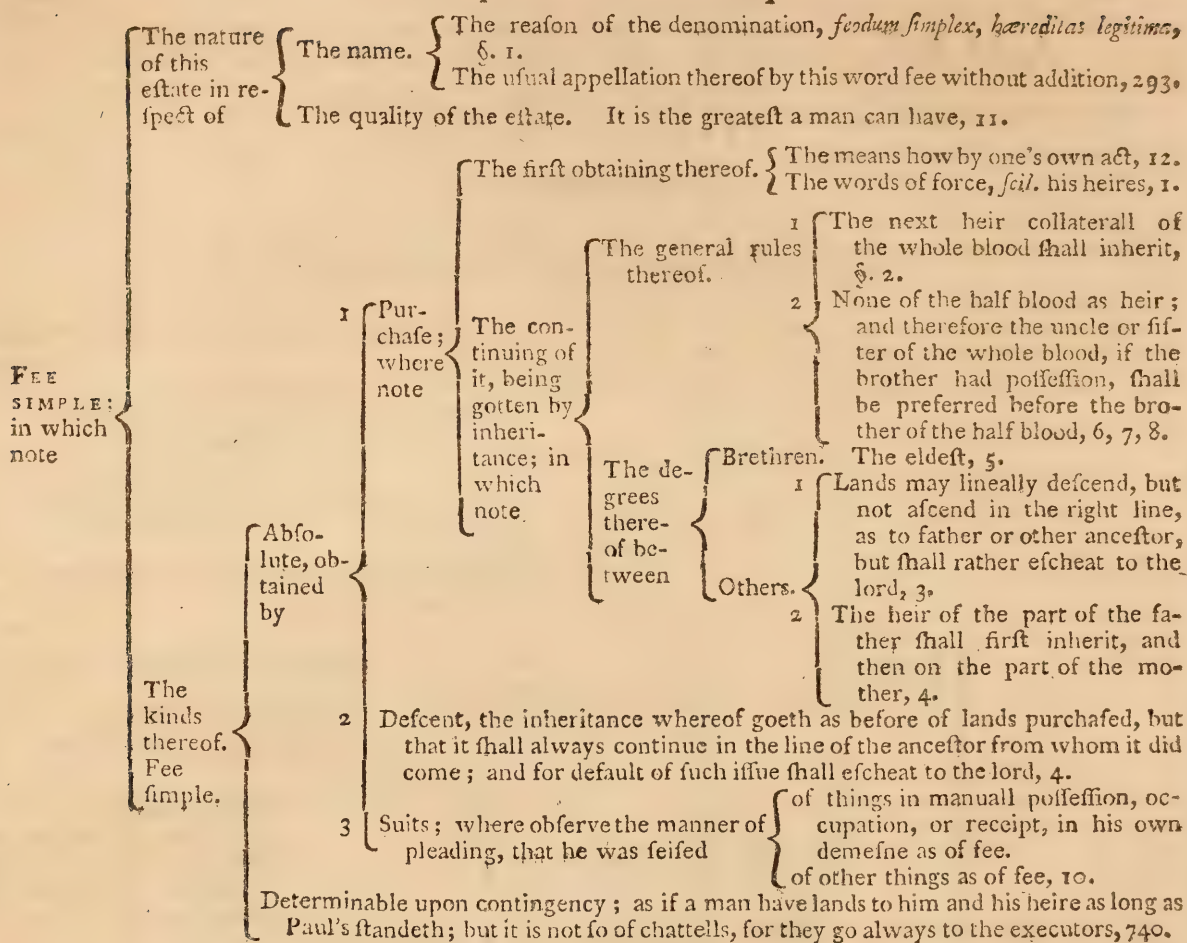
Mine advice to the student is, that before he read any part of our Commentaries upon any Section, that first he read again and again our author himself in that Section, and do his best endeavours, first of himself, and then by conference with others, (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at any one time than he is able with a delight to bear away, and after to meditate thereon, which is the life of reading. But of this argument we have, for the better direction of our student in his study, spoken in our Epistle to our First Book of Reports,

And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author, or of our Commentaries, yet let him no way discourage himself, but
proceed ;

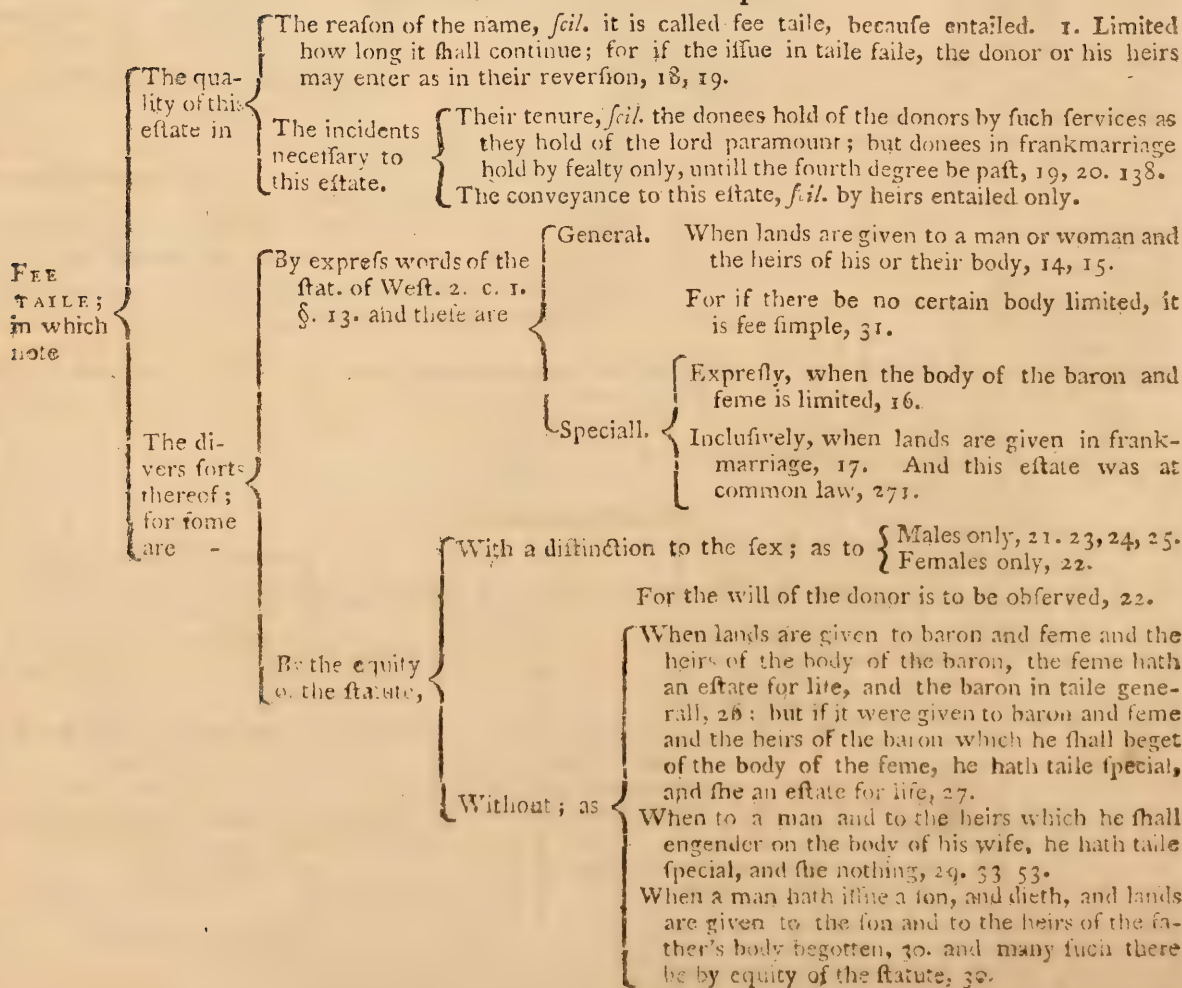
T H E P R E F A C E.

proceed ; for on some other day, in some other place, that doubt will be cleared. Our labours herein are drawn out to this great volume, for that our author is twice repeated, once in French, and again in English.

Fee Simple. Lib. 1. Cap. 1.



Fee Taile. Lib. 1. Cap. 2.



Tenant in Taile after Possibility of Issue extinct. Lib. 1. Cap. 3.

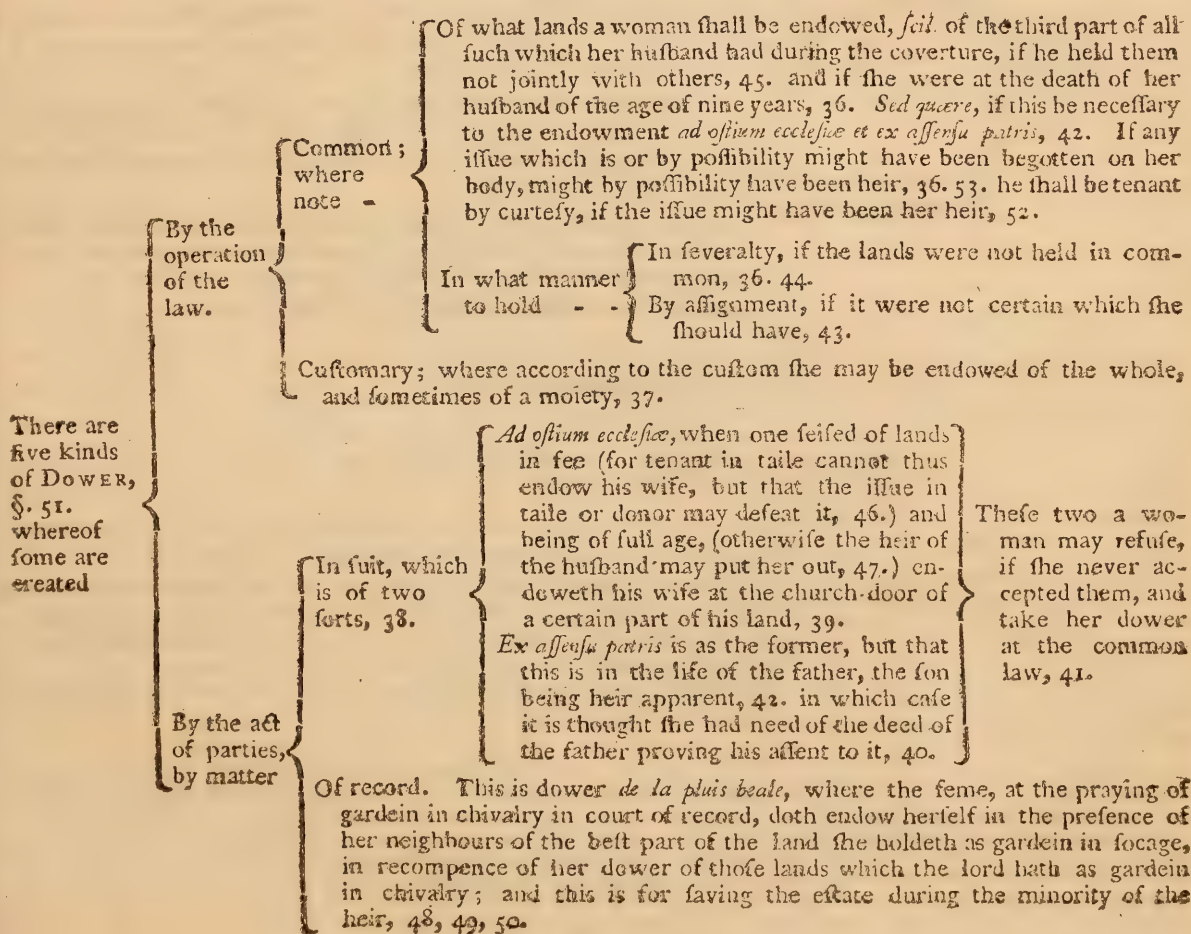
Is when lands are given in special taile, and one of the donees or the man or woman of whose body the issue in taile is limited to proceed dieth, there being no issue in taile in life, then the surviving donee is thus called, because there is no possibility left of having issue inheritable to the land, §. 32, 33, 34.

Tenant by the Curtesy of England. Lib. 1. Cap. 4.

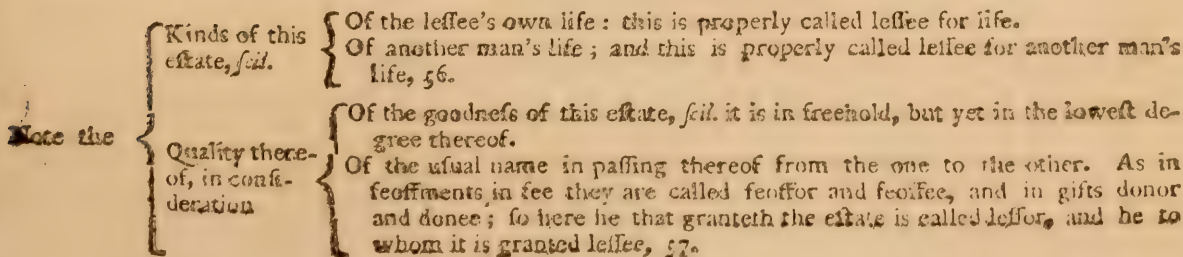
Is when one taketh a feme inheritrix to wife, in whose right he was seised of lands, and by whom he hath or hath had issue born alive, which by possibility might inherit those lands after her death, for he is tenant by the curtesy of England, §. 35.

The reason of the denomination, *scil.* because used in no other country but in England, 35.

Dower. Lib. 1. Cap. 5.



Tenant for Term of Life. Lib. 1. Cap. 6.



Tenant for Years. Lib. 1. Cap. 7.

| | | | | |
|---------------|---|---|--|---|
| Note the | { | Name of this estate, viz. - - | { When one leaseth lands to another for a term of years, the lessee is thus called, 58. So if the lease be but for half a year, or a quarter, for there is no other term to term him, 67. | |
| | | | 1 | { The lessee may enter when he will by force of his lease, by or without deed; and livery is not necessary, unless where freehold passeth in possession or remainder [then it is], 59, 60. Unless it be in exchanges, where if the lands be in one county it is good by parol, 62, 63. |
| | | | | { That the estate of the exchangers must be equal [not the value], 64, 65. That in both their deeds mention must be made of the exchange, 65. |
| | | | 2 | { How many liveries there needs [when necessary], <i>scil.</i> but one in every county, if it be made in the name of all in the same county, 61. |
| Nature of it, | { | How it passeth from the lessor to the lessee. | { By what circumstances. At what time it taketh effect, <i>scil.</i> at the time prefixed, although the lessor die before the day; and yet the death of the feoffee is a countermand of a letter of attorney to deliver seisin, 66. | |
| | | What inconveniences this estate is tied unto. | 1 | { To pay the rent reserved, else may the lessor distrain or bring an action of debt; but if the lessor were not seised at the time of the lease, the lessee may plead in barre, if it be not by indenture, 58. |
| | | | 2 | { He must move his household stuff, and come before his lease expire, or else after the lessor may take them, 68. |
| | | | 3 | { The lessee for years is bound to repair the house, &c. 71. |
| | | | 4 | { Liable to a writ of waste, if he commit any, 67. |

Tenant at Will. Lib. 1. Cap. 8.

| | | | | |
|----------|---|---|--|--|
| Note the | { | Divers sorts of this estate; for it is created either - - | { Expressly; as when one letteth lands to hold at his will; and it is called so, because there is no certainty of the estate but only at will, 68. If therefore it be granted to the lessee and his heirs at will, this word (heirs) is void, 82. Yet if the lessor determine his will, the lessee shall have convenient time to carry away his corn and household stuff, as well as executors for the goods of their testator, 68, 69. By implication; as when one having a deed of feoffment made unto him, and entereth before livery, 70. | |
| | | Necessary appendances to this estate. For - - - | { The services reserved. { They shall not do fealty, 84. They must pay the rent reserved, else may the lessor distrain or bring an action of debt, 72. The things he is not bound to reparations, yet is punishable for voluntary waste, as well as a bailee for goods lent him, 71. | |

Tenant at Will according to Custom. Lib. 1. Cap. 9, 10.

| | | | | |
|--|---|---|--|---|
| Note the | Diversity of this estate ; for it is by - | Copy of court roll, 73. and so called, because the tenants have no other evidence but of their lord's court roll, 75. And it is when one holdeth land at the will of the lord ; and although they have inheritance, yet if the lord oust them, they have no remedy but by petition, 77. according to the custom of the manor, 73. | | |
| | | The verge ; which differeth from the former only in the use of the white rod in their surrenders, 78. | | |
| | Condition of it ; in regard of | The quality of it is a base tenure, for they have no freehold by course of common law, 81 ; although by custom they may have estates of inheritance, 81, 82. | | |
| | | The circumstance | Surrender is | In passing it from a man, which is by surrender ; for if he alien by deed, it is a forfeiture, 74. And this |
| Into the hands of the lord, to the use of him who should have it by some custom, 78. | | | | |
| | | | Into the hands of the bailiff or reeve, or of two honest men of the same lordship, and they to present it at the next court, 79. And generally all such customs not repugnant to reason are allowable, 80. | |
| | | In continuing of it being passed by - | Fine, which must be by plaint in their lord's court, 76. | |
| | | | Sustentation of their houses by reparation, 83. | |
| | | | Service, <i>scil.</i> such a tenant must do fealty, 84. | |

132.

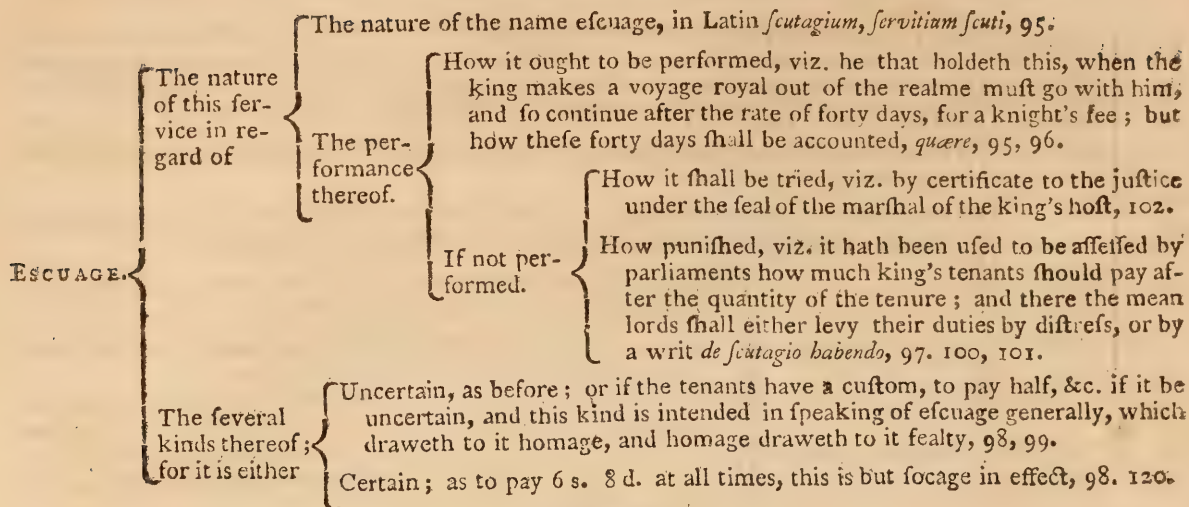
Homage. Lib. 2. Cap. 1.

| | | | |
|--|--|---|---|
| HOMAGE. | The nature of this service ; <i>scil.</i> it is the most honourable a tenant can do to his lord, 85. | | |
| | The persons which should | { | Make it. They must have a greater estate than for life ; for no tenant for life can take or do homage ; therefore one entitled to be tenant <i>per</i> curtesy during the life of his wife shall do homage ; after her death not, 90. |
| | | | Take it ; none but the lord himself, 92. |
| | The performance of it ; where note | { | The service itself. |
| Of him only, " I become your man," &c. unless he be a man of religion, or feme sole, and they shall leave out these words, 85, 86, 87. | | | |
| | | | Of more lords, he shall say in the end, " saving my faith which I owe unto my sovereign lord the king and other lords," &c. 89. |
| | | { | One tender, if the lord refuse, excuseth the tenant of being distrained for it, until his lord demand it again, and it be denied, 150, 151. |
| | The times how often it shall be done, viz. | | Once doing of it excuseth him for his life against any that comes in by descent ; but not against him that recovers by any title. 148, 149. |

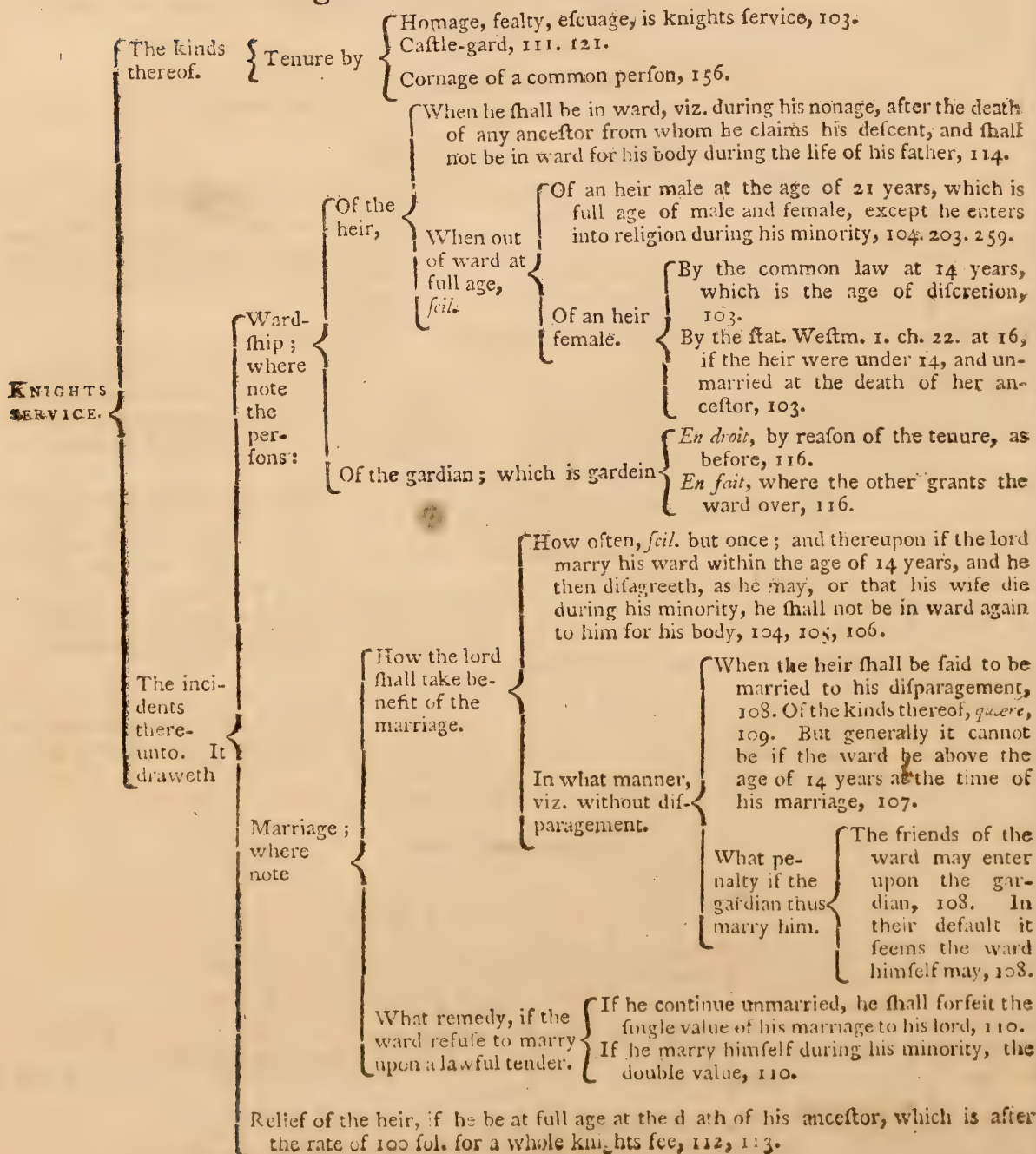
Fealties. Lib. 2. Cap. 2.

| | | | | | | |
|----------|---|---|---|--|------------------------------|---|
| FEALTIE. | { | What manner of service this is. | { | Fealtie, in English, is as much as <i>fidelitas</i> in Latin, 91. It is incident to all tenures but frankalmoigne, 131. | | |
| | | | | | | |
| | { | How long it is to be performed; where note | { | The persons which should - - - | { | Make it; <i>scil.</i> for life or years, but not tenant at will, 93. 132. |
| | | | | | | Take it; the steward or bailiff of the lord's court, 92. |
| | | | | | The forms of it, 88. 91. 94. | |

Eſcuage. Lib. 2. Cap. 3.



Knights Service. Lib. 2. Cap. 4.



Socage. Lib. 2. Cap. 5.

- SOCAGE.**
- The tenure itself; where note
 - The divers sorts thereof.
 - Where one holdeth lands by certain service for all manner of services, as homage and rent, or homage and fealty, or homage, fealty, and rent, 117.
 - By fealty only, if the lord refuse no other service, 118. 130, 131.
 - By escuage certain, 120. to pay a sum certain for guarding a castle, 121; and generally, by any service which is not knights service, 118.
 - The denomination, *socagium*, or *servitium socæ*; the name whereof remaineth, although for the most part the manner of the service by mutual consent be altered into an annual rent, 119.
 - The incidents appertaining
 - To the lord of whom the lands are holden, relief after the death of such a tenant: where note
 - How much must be paid for relief, *scil.* the value of a whole year's rent to the lord, 126. 128.
 - When to be paid, *scil.* immediately, or else the lord may distrain for it unless the services be of that quality that they cannot be gotten but at some certain time of the year, 127. 129.
 - To the gardian in socage.
 - Ward: for if such tenant die, his heir within the age of 14 years, his *prochein amy*, to whom the inheritance cannot come, shall always have such heir in ward until he be 14 years of age; but he must account for the profit, the reasonable expences deducted, and so must any other that taketh upon him as gardian; but account will not lie against executors but for the profits after the age of 14 years. *Quære*, whether it shall be brought against him for profits after 14 as gardian or bailiff, 123, 124, 125.
 - Marriage doth not of right belong to the gardian; but if he do marry his ward, he must account for it, 123.

Frankmoigne. Lib. 2. Cap. 6.

- FRANKALMOIGNE.**
- The commencement of this tenure.
 - To whom lands may be so given to be holden, *scil.* to a man of the holy church, or to be a special corporation, 133, 134.
 - By whom. By the king only, unless it be by prescription, or else before the statute of *quia emptores terrarum*, an. 18. Ed. 140.
 - The continuance thereof.
 - How long, *scil.* so long as the privy continueth; for if - - -
 - The tenancy to be alienated by tenant be in frankmoigne, or that the reversion cometh to another than the donor and his heirs, this tenure is determined, 139. 141.
 - In what manner; where note
 - What service the tenant must do, *scil.* no terrene service, or other service certain, for then he is called tenant by divine service, 137; but in conscience he ought to make prayers for, &c. but is not compellable otherwise than by complaint to the ordinary visitor, 135, 136. 138.
 - What advantage this tenure hath, *scil.* it draweth to it acquittal, 142.

Homage Auncestell. Lib. 2. Cap. 7.

- HOMAGE ANCESTRELL.**
- When it shall be called homage auncestell, *scil.* when it hath continued in the lineal descent of lord and tenant without alienation, 143. 147. and it may be either in socage or knights service tenure, 152.
 - How it differeth from other services, *scil.* in
 - Acquittal, 144.
 - Warranty, if the lord then being hath received homage of the tenant or his ancestors, else may the lord disclaim, 147. 145. And upon disclaimer the feignory is extinct, and the tenant shall hold of the lord next paramount, therefore an abbot or prior may not disclaime, 146.

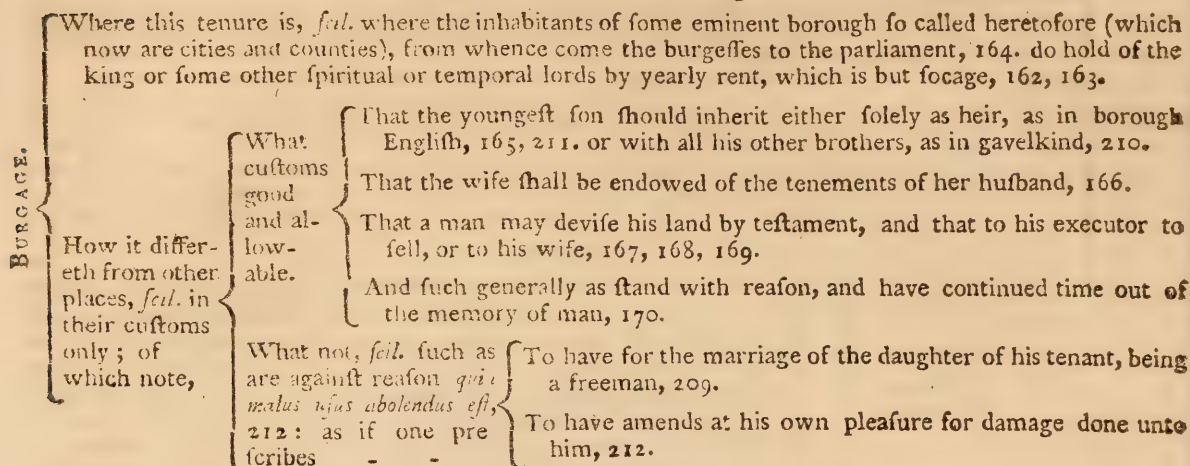
Grand Serjeantie. Lib. 2. Cap. 8.

- GRAND SERJEANTIE.**
- The service wherein.
 - The several kinds thereof.
 - When one holdeth of the king to do some special service to the king (for the most part within the realm), 155. in proper person, 153. or by some other, 157.
 - When one holdeth of the king by cornage, 156.
 - The nature of it.
 - Called grand serjeanty, *quasi magnum servitium*: it can be held of none but of the king, 154. 156.
 - The incidents thereto.
 - Ward, 158.
 - Marriage, 107, 108.
 - Relief, which is the value of the land for a year *ultra reprisas*, 154.

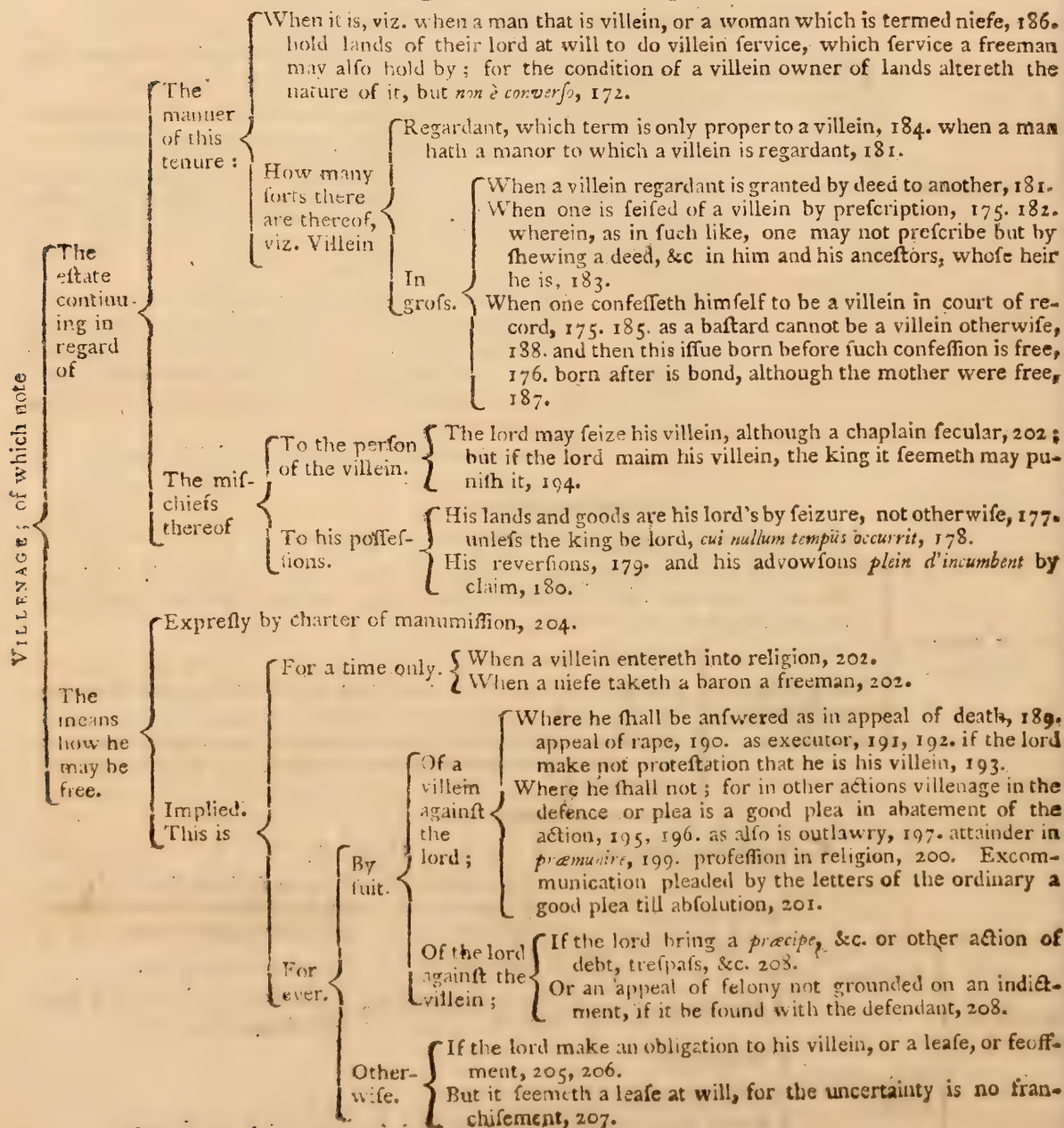
Petit Serjeantie. Lib. 2. Cap. 9.

This is to render some small thing touching the war, as bow, arrow, &c. 159. which although it be focage in effect, 160. yet it can be held of none but of the king, 161.

Burgage. Lib. 2. Cap. 10.



Villenage. Lib. 2. Cap. 11.



Rents. Lib. 2. Cap. 12.

RENTS are three sorts.

Rent
service,
which is
reserved
upon a
tenure;
where
note,How it hath
beginning.How a
determi-
nation of
it.In all
by dis-
seisin.By the ten-
ant him-
self;
wherein
note,The divers kinds of disseisin;
which are, - - -

Rescous,
Replevin,
Inclosure,
Denial,

} 237.

and, which is common
to the others,
Menacing of him
which should de-
mand it, 240.

The means to recover the rent, when any disseisin is,
viz. by an assise, which is *vox equivoca*, in this sense
taken for a writ of assise, 234.

Rent charge, viz. when
one granteth rent with
a clause of distress, 218.
or when rent is granted
upon equality of parti-
tion; where note, 251,
252, 253.

How a grant of
such a rent doth
inure; *scil.* eitherBy what means
such rent may be
lost.By distress and avowry in a court of record to charge the
land, 219.By a writ of an-
nuity to charge
the person of the
grantor, 219. un-
less - - -

There be a special proviso for not
charging the person, 220.

Or that the grant be only that if such a
rent be unpaid to *I. N.* that he may
distrain in such a place, 221.

By purchase of parcel of the land charged, the whole rent
is utterly extinct; but if parcel descend, the rent shall
be apportioned, 224.

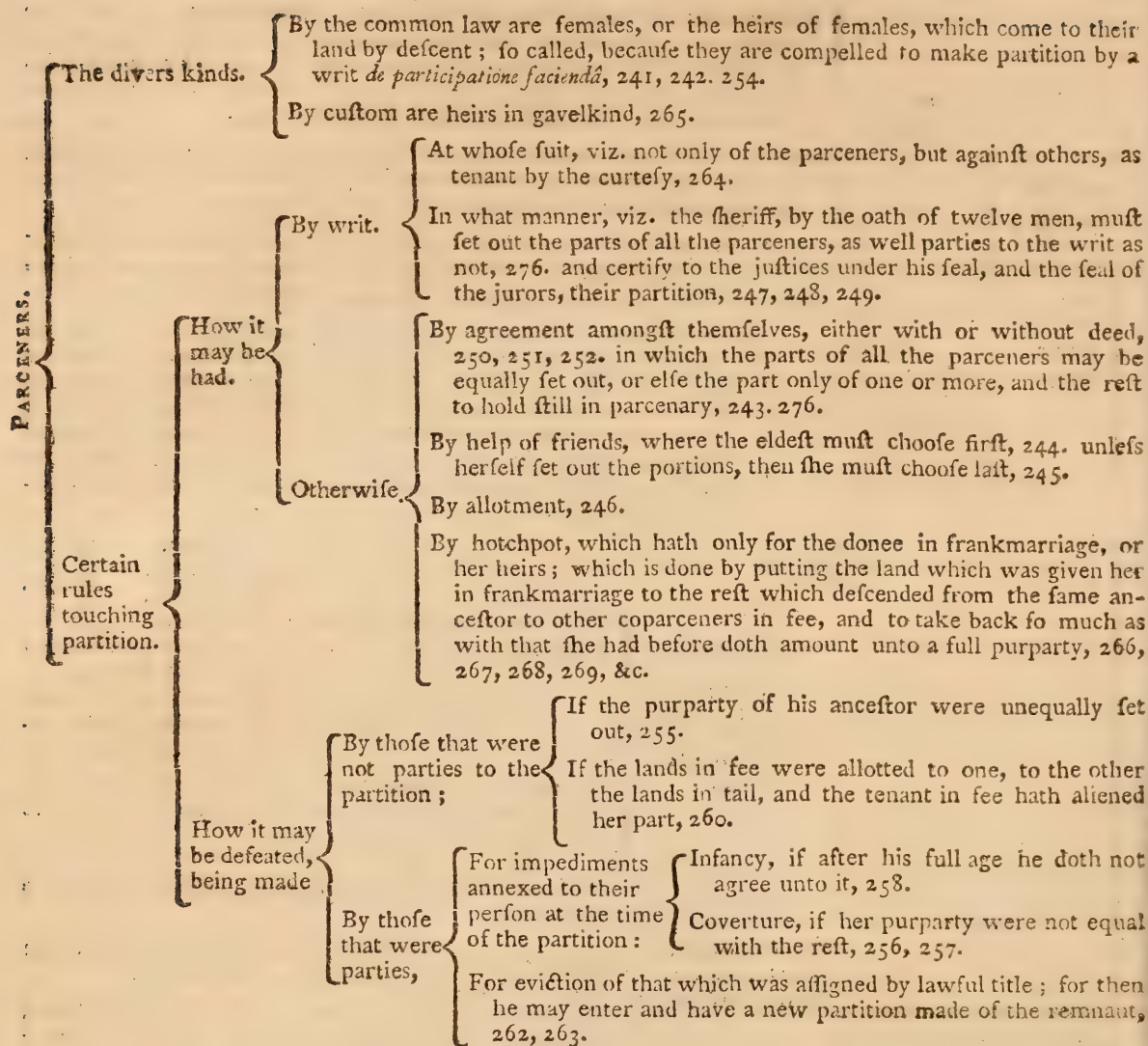
By disseisin it may be interrupted;
the causes whereof are four:

{ Rescous,
Replevin,
Inclosure,
Denial, }

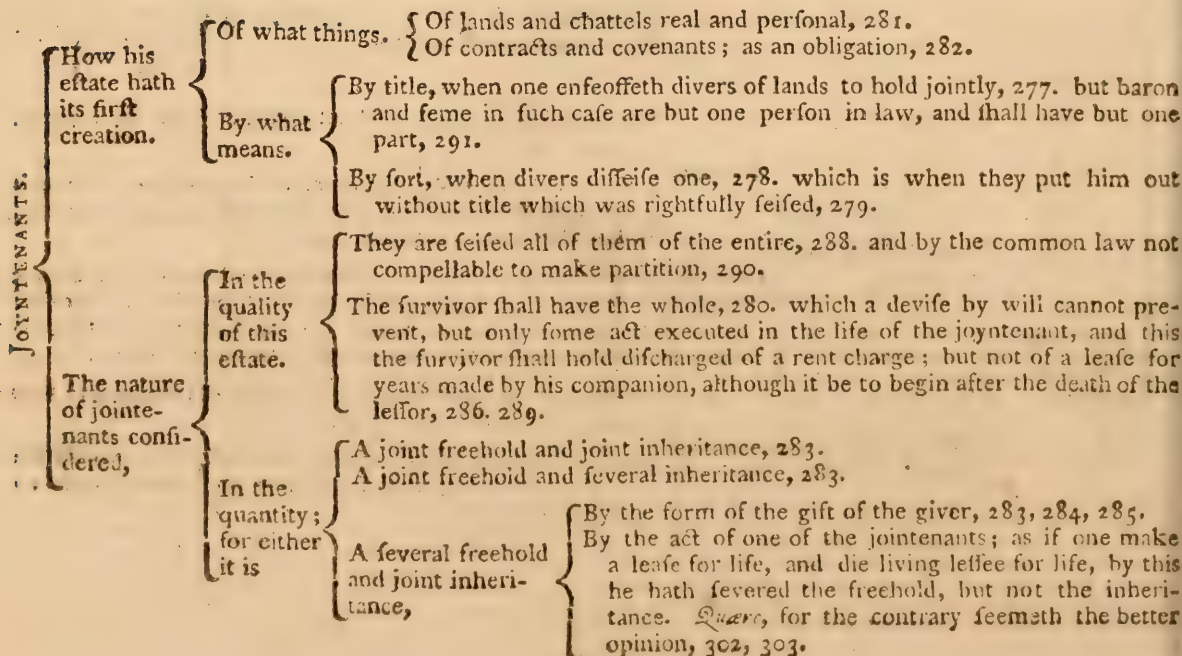
} 238.

By grant: { If one grant rent out of land without clause of distress,
218.If one hold by fealty and rent, or by homage fealty and
rent, and the lord grant the rent only, or grant the rest,
reserving the rent, 225, 226.By other accidents; as if there be lord mesne and tenant, the tenant
holding over by 5 s. rent, the mesne holding over by 12 d. the lord
purchaseth the tenancy, the mesnalty is extinct, yet shall the mesne
have the surplusage of the rent, which is 4 s. as a rent feck, 231, 232.Rent feck;
in which
consider,How it hath the
original.How it may be recovered
when it is lost.Not by distress, for that were contrary to the name of rent
feck, *quasi redditus fectus*, 218.But if the grantee have had seisin thereof, if he be disseised
of it, which is by denial, enclosure, 239. he may have an
assise, 233, 235.

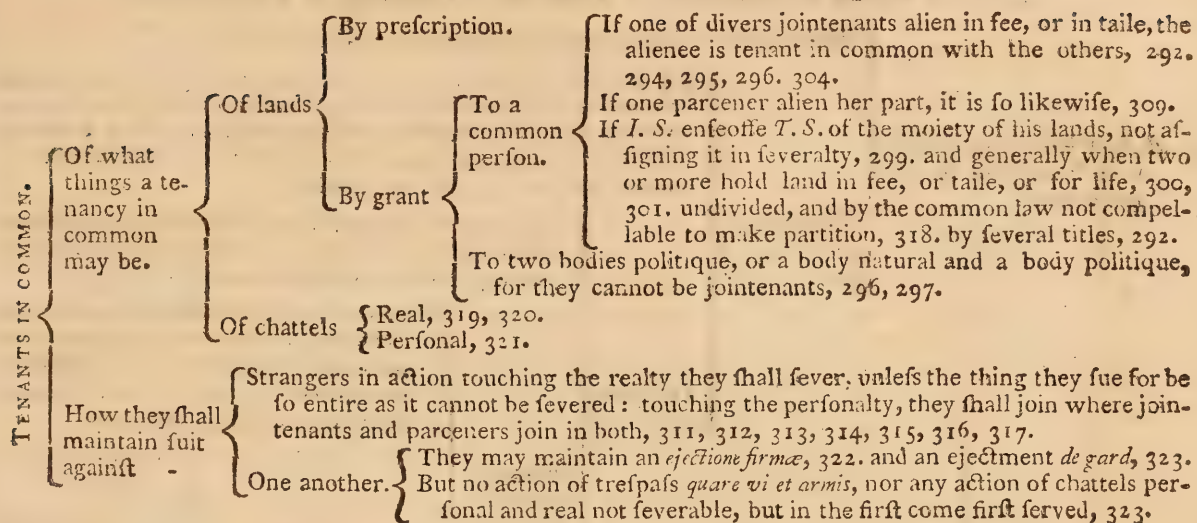
Parceners. Lib. 3. Cap. 1. and 2.



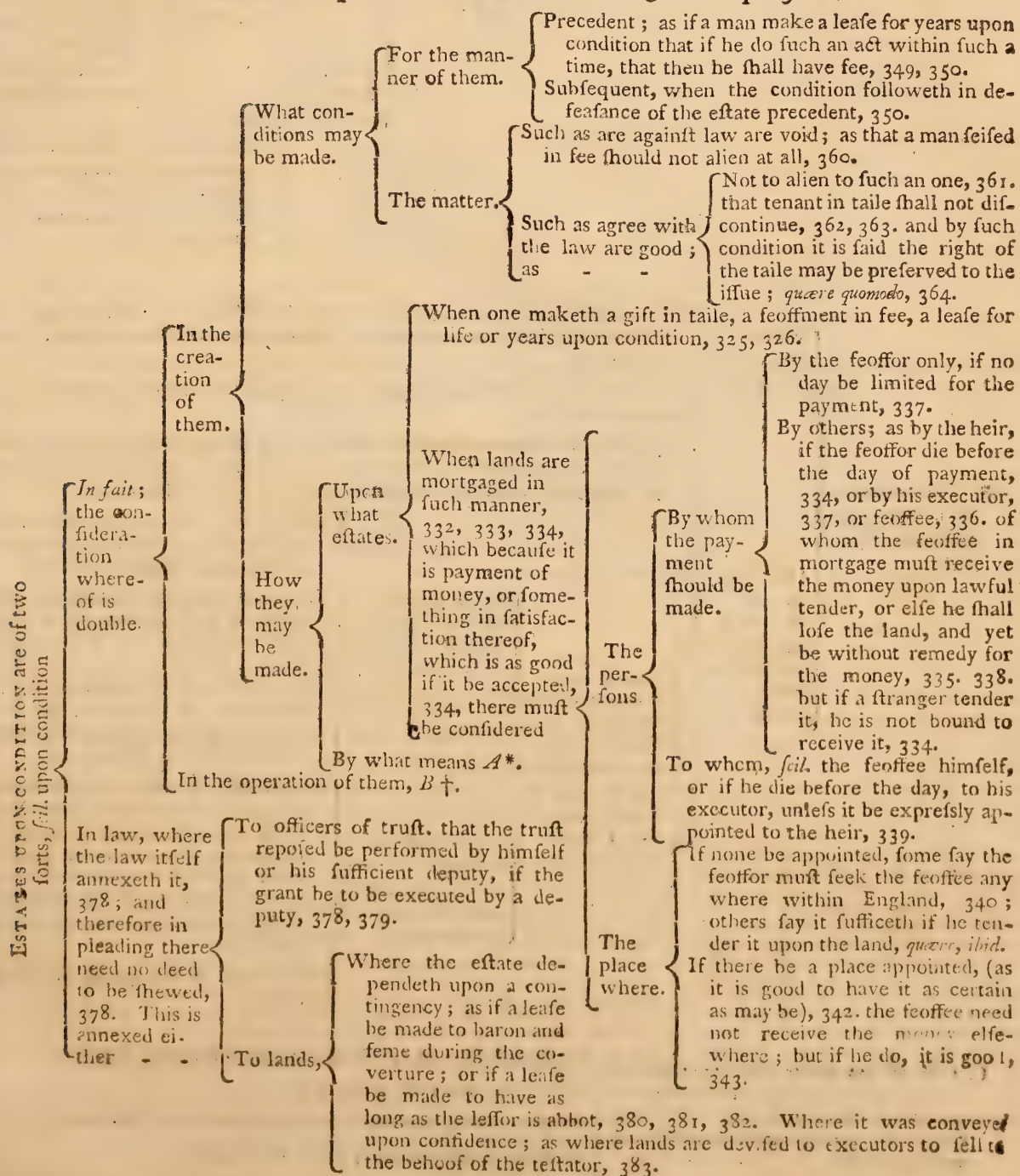
Joyntenants. Lib. 3. Cap. 3.



Tenants in Common. Lib. 3. Cap. 4.



Estates upon Condition. Lib. 3. Cap. 5.



Estates upon Condition. Lib. 3. Cap. 5. *Continued.*

A. By what means Estates upon Condition *in fact* are created,

Without deed; as if a condition be made upon the livery, 359.

With deed; in which note

The force of the deed: for a condition to defeat a franktenement cannot be pleaded without deed, but for a chattel it may, 365. yet the jury, by a verdict at large, may find such a condition without, and the party may take benefit of it if he be not enforced to plead it, 366, 367, 368, 369.

The form of it,

In regard of the words which import a condition, *sub conditione*, 328. *proviso semper et ita quod*, 329. *si contingat*, with a clause of re-entry, 330, 331.

In regard of the fashion of the deed; for either it is -

Poll; and then it is doubted whether the feoffor may plead the condition, because by intendment it appertaineth to the feoffor; yet it seemeth he may plead it, *quare*, 375, 376, 377.

Indented. In this observe

In the first person, 372.

The manner of making them.

In the third person, 371. and both are equally good, if mention be made that both persons have put to their seals, 373.

The manner of pleading them, when the shewing of one part is as good as of the whole; for be it bipartite or tripartite, it is all but one deed, 370.

B. The operation of Estates upon Condition *in fact*.

Whom do they tie; *scil.* any

That come in by descent; and although there be divers disseisins and descents past, yet the working of a condition shall take place, 391, 392, 409.

That come in remainder, although the particular tenant only receive the condition, 374.

To leave their estate entire, and detain but the use only for a time; as when a lease is made, and rent reserved with a condition to re-enter upon non-payment, and detain it until, &c. in manner of a distress, 327.

How they do tie those that are subject thereunto, *scil.* either

To wipe away the whole estate in such degree, discharged as it was at the time of the making of the condition, 358. This is

Upon breach of the condition, where the feoffor may enter.

And in such case, where an entry is congeable, the franktenement resteth not without entry, 351.

But such entry or re-entry can be reserved to none but the feoffor and his heirs, 347. as *Richell's* case is, 720, 721, 722, 723, 724. For if a feoffment be made to pay a yearly rent to a stranger, the condition is good, yet the rent is but a penalty to the feoffee, *ibid.*

Upon such an act done that the condition cannot afterwards be performed.

By the act of God; as by the death of them to whom the condition is to be performed: but if some of them only be dead, the feoffee must perform it to the other as near the meaning of the parties as he may, and so be discharged, 352, 353, 354.

By the act of the party, C. Vide *infra*.

C. Acts of the party that the condition cannot be performed afterward by him, and yet he should perform the condition as if he were to make a feoffment, and the feoffee - - -

Make a feoffment or a lease for life to another, 355.

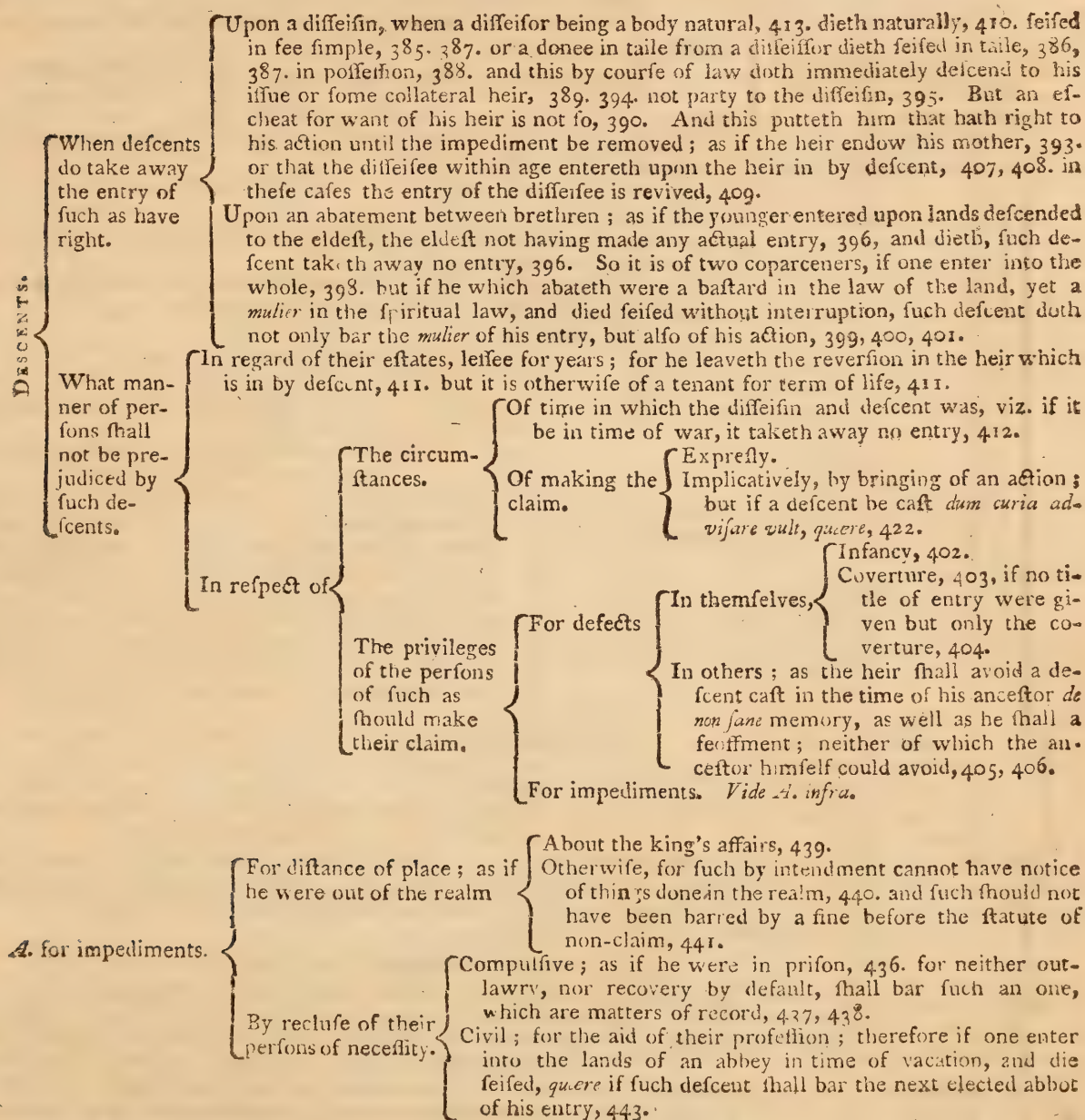
Or make a lease for years, 356.

Or take a wife, if he were sole at the time of the feoffment, 357.

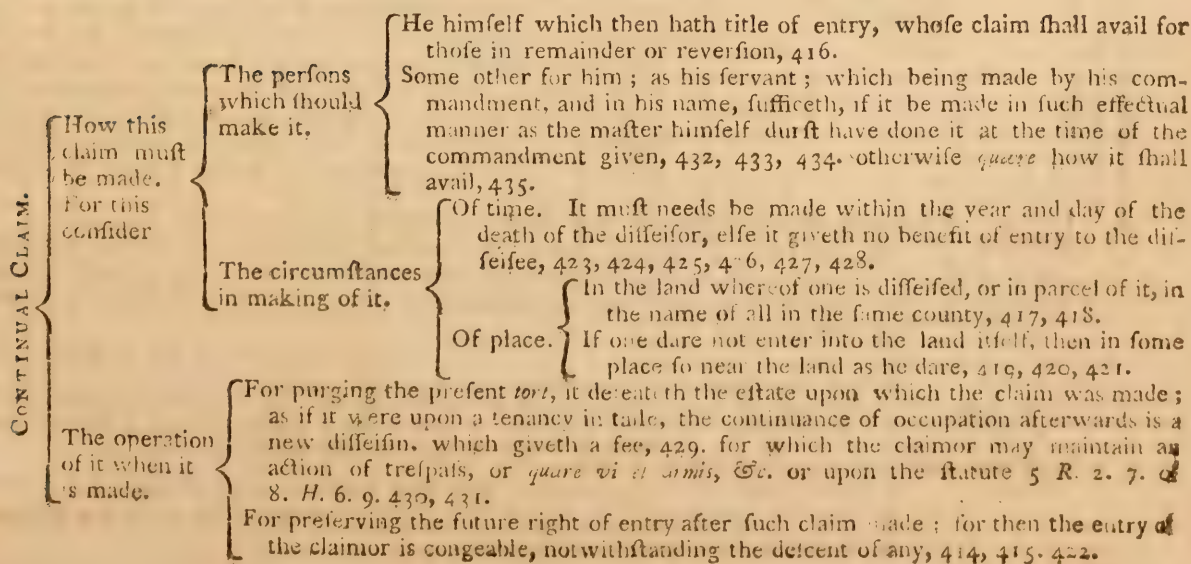
Or if he charge the land, *quare de hoc*, 358.

Estates upon Condition. Lib. 3. Cap. 6. and 7. *Continued.*

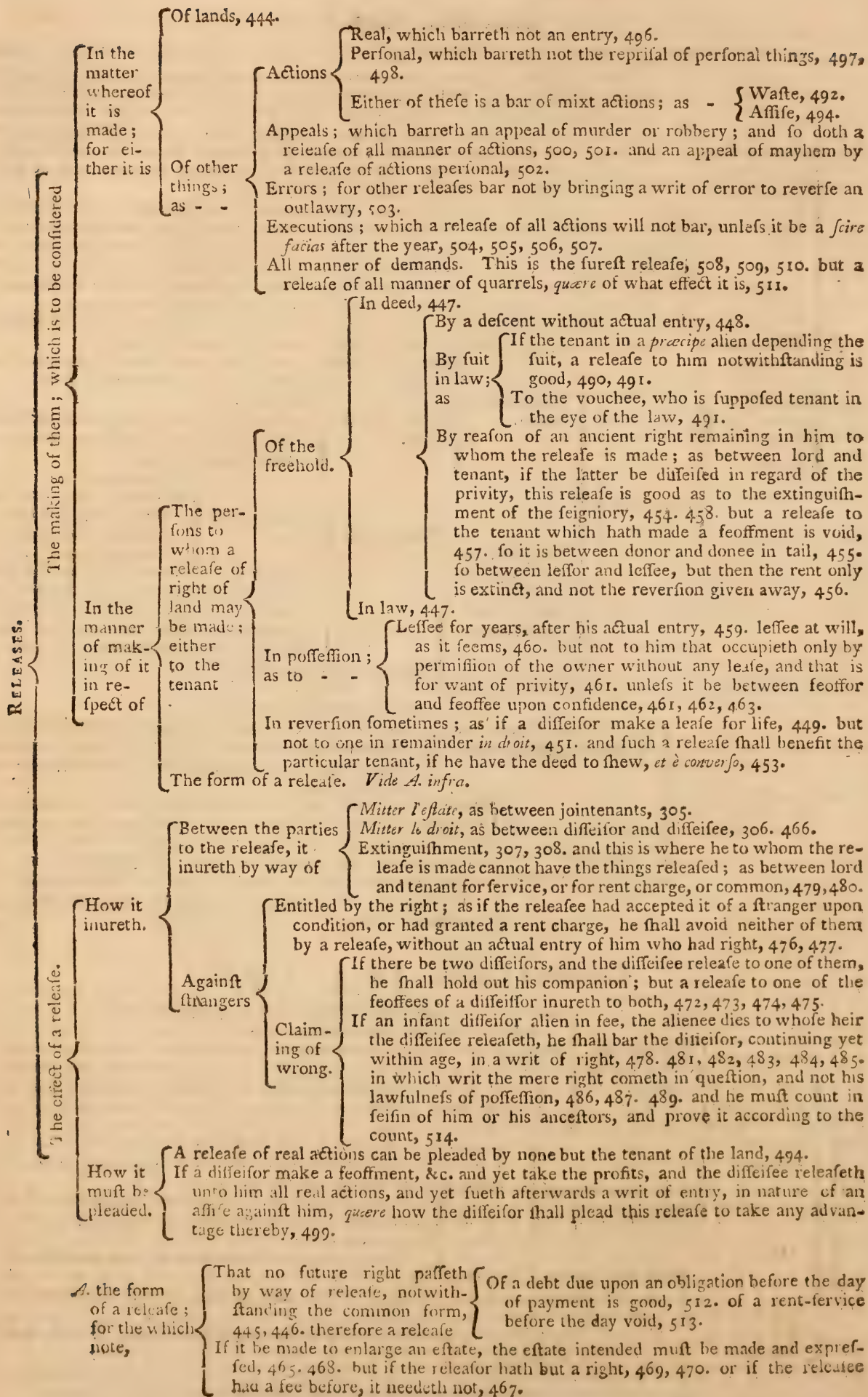
Descents. Cap. 6.



Continual Claim. Lib. 3. Cap. 7.



Releases. Lib. 3. Cap. 8.



Confirmation. Lib. 3. Cap. 9.

| | | |
|------------------|--|---|
| CONFIRMATION. | The form of it, 515. in which these words <i>dedi et concessi</i> amount to as much as <i>confirmavi</i> , 531. which (as some others) inureth by way of extinguishment; as where the lord granteth his rent to the tenant, or the grant of a rent-charge, 543, 544. | |
| | Where it inureth, viz. where there is such a possession before whereupon a confirmation may work; therefore if one take away my villein in gross, and I confirm his estate, it is void, 541, 542. | |
| | How it inureth. | Expressly. |
| | | By implication; as if the heir of a disseisor being in by descent, the disseisee joineth with him in a feoffment, here is the confirmation only of the disseisee, and the feoffment of the other; but if the disseisee shall bring a writ of entry in the <i>per et cui</i> against the feoffee, <i>quare</i> how he shall plead this, 534. |
| The force of it, | In what manner. | Merely to confirm an estate made before, which is the proper force of it; for <i>confirmare idem est quod firmum facere</i> ; as when disseisee confirmeth the estate of the disseisor, 519, 520, 521, 522. or of a lessee to a disseisor, or a rent-charge granted by a disseisor, though he after enter into the land, <i>quare de hoc</i> , 527. or when the lessor confirmeth the grant, 529, 547. or the lessee of his lessee, 516, 517. or when the lord confirmeth the estate of the tenant of the land where the feignory, rents, and common, remain notwithstanding, 535, 536, 537. or where the parson of a church chargeth his glebe by the confirmation of the ordinary or patron seised in fee, it is made perpetual, 528. 648. <i>quare</i> , whether the patron and chaplain may not do the like, 530. |
| | To what purpose. | To commence presently, 524. 526. 533. |
| | To confirm with some addition. | To take effect by way of remainder, 523. where it is necessary to have these words, <i>aver et tener</i> , 525. but by neither of both a rent-charge can be enlarged by confirmation, but by new grant upon surrender of the old; but the rent <i>in esse</i> before may be, 548, 549. |
| | | By enlarging the estate confirmed. |
| | | By altering of it; as a lord by confirmation may diminish the services of his tenant, but not exchange them for other or reserve new, 538, 539. unless he alter it by frankalmoigne, which indeed is no corporal service, 540. |

Attornment. Lib. 3. Cap. 10.

ATTORNMNT.

Where it needeth.

Unless

The party which should attorn

Have sufficient before the grant; as,

Be the same person which granteth; for then he cannot attorn to his own grant, 578.

Where one jointenant releaseth to another, there lessee need not attorn, 574.

Where there is lessee for life, the remainder for life, and the lessor releaseth in fee to him in the remainder, 575.

Where services be granted to the tenant, who hath as great estate in the tenancy as the grantor hath in the feignory; for there it inureth by way of extinguishment, 561.

Upon grants of feignories, the tenants of the manor must attorn, but not the tenants at will, 553. If it be in lease, he in the reversion must attorn, for he is tenant to the lord, 554. 562. but he in remainder must not, for then the particular tenant is tenant *quant al faire avowry*, 557. and if there be mesne and tenant, the mesne must attorn, 555.

Upon grant of a reversion, the tenant of the freehold, 571. and tenant in tail may attorn, but he is not compellable, 570.

Upon grant of a remainder, the particular tenant, 569.

Upon grant of a rent-charge, the tenant of the freehold, 556.

Expressly, 551. where the attornment by one jointenant, 566, or by one kind of service, if it be held by divers, 563, 564, is as effectual as if it were by all, because the feignory is entire.

By accepting of the grant

Of a reversion, 558, 559, 560.

Of a remainder; as where the estate of the tenant for life is confirmed with a remainder, 573.

By giving *un denier* as seisin of the rent, which includes an attornment, but not otherwise, 565.

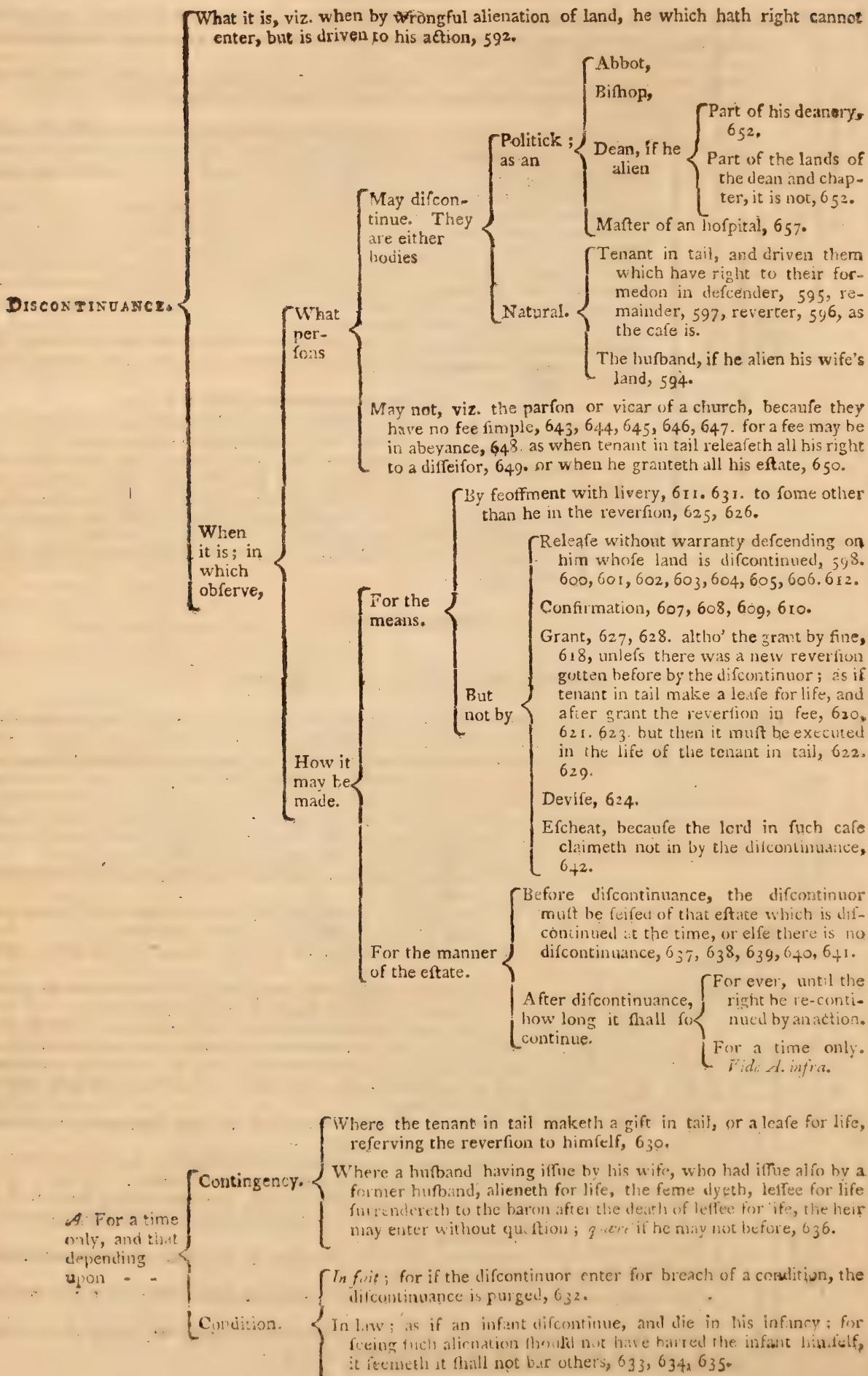
By re-entering into his term; as if lessor enter upon his lessee for years, or life, and make a feoffment, and the lessee re-enter, 576, 577.

How it is made.

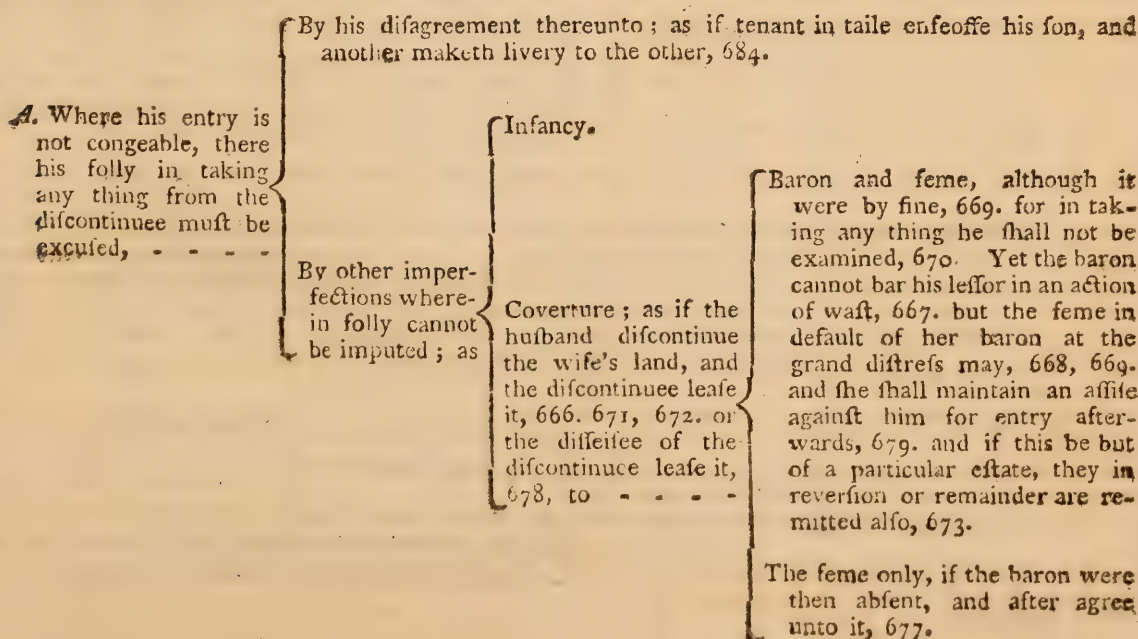
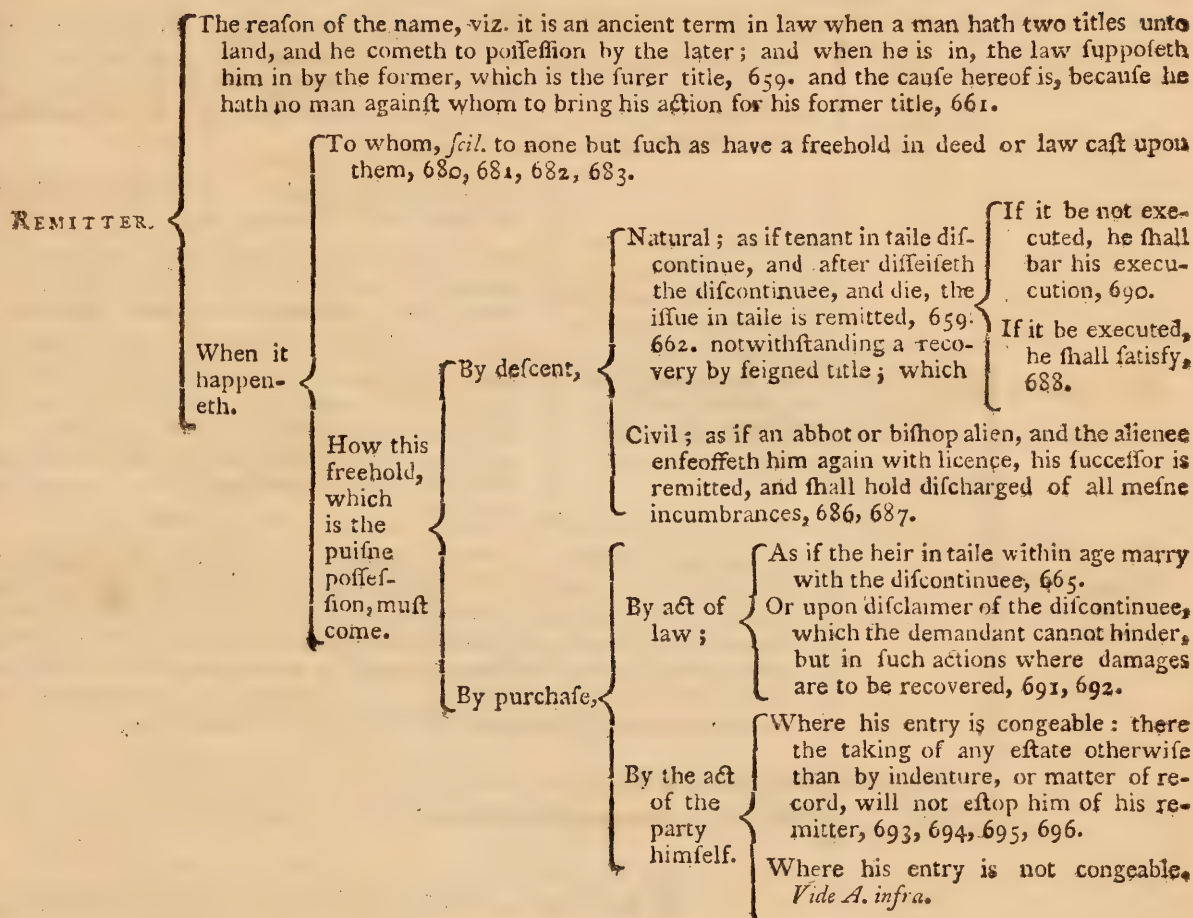
In what manner.

Implicatively;

Discontinuance. Lib. 3. Cap. 11.



Remitter. Lib. 3. Cap. 12.



Warranty. Lib. 3. Cap. 13.

WARRANTY.

The several
kinds of it ;
which are,

Lineal, where a man maketh a feoffment with warranty, and this descends to his son ; the cause of which name is not for the lineal descent of it, but because the land should have lineally descended if such warranty had not been, 703. 706. 715. The like is of the feoffment of the mother with warranty, 713, 714.

Collateral. This is where he that maketh the warranty is collateral to the title ; and he upon whom the warranty descendeth cannot convey the same land from the warranty, 705. 717 ; as -

If the father disseise the son, and after make a feoffment with warranty, 704.

If a man be disseised of lands in fee, and have issue two sons, the youngest releaseth with warranty, this is collateral to the eldest, 707, 708.

If the disseisee were of lands in taile, the warranty of the uncle is collateral, 719. And so if a man have three sons, and entail his land to the eldest, with remainder to the second, &c. and the eldest doth discontinue with warranty, 716. 719. As it is of sons, so it is of daughters, 710.

Commencing by disseisin ; as if the father, &c. being lessee for years, or at will, of his sons, make a feoffment with warranty, 698. or if he be jointenant with his son, and make a feoffment of all the warranty, 700. So if guardian in focage or chivalry make feoffment, 699. So if a disseisee immediately make a feoffment over with warranty, 702. or if one make a feoffment of the house of *A. B.* with warranty to barretors of the country, for fear of whom *A. B.* departeth the house, 701.

The quality
of it.

What words will make a warranty, viz. *Warrantizzo* only, 733.

What effect a warranty is of, viz. to bar or rebutt, &c. *Vide A. infra.*

What warranties
do bar, viz.

Lineal, for lands in fee, but not in fee taile without affets, 712.

Collateral barreth both, but in cases especially provided, 712. as by the stat. of *Gloucester* the warranty of the tenant by the curtesy barreth not without affets, although it be by fine levied by the husband only, 724. 728, 729, 730, 731, 732. But tenant in dower or for life are not within the statute's compass, 725. yet if such warranty descend upon an infant, he shall not be barred, 726.

Commencing by disseisin doth never bar, 697.

A. What effect a
warranty is of,
viz. to bar or
rebutt, &c. ;
where note,

Whom they bar, viz. none but those upon whom they do descend ; therefore they must needs attach in the ancestor, and the warranty by devise barreth not, 734. and warranty doth descend always upon the heir, therefore it never descends upon the brother of the half-blood, 737. nor where the blood is corrupted, 745, 746, 747, at the common law ; not by custom, as borough English, or gavelkind, 718. 735, 736.

How long they bar,
viz. until - -

The estate whereunto
they be annexed be

{ At an end, 738.

{ Defeated, 741, 742, 743, 744.

{ The warranty be releaseth, and he on whom the warranty doth descend hath the release to shew, 748.

A D V E R T I S E M E N T

TO THE PRESENT EDITION.

*I*N this Edition, the Original Work, comprehending the Text of LITTLETON'S TENURES in French, with an English translation, and Lord COKE'S COMMENTARY, is printed in Two Volumes, the Notes of the Editors being contained in a separate Volume, divided in the order of the Three Books of LITTLETON, and made to correspond therewith by a number affixed in the margin to each Note, answering to references at the foot of the page of the original work. This Volume includes all the Notes containing any distinct position of law, or any observation or comment thereon. Such other Notes as consist merely of corrections of the Text, and of references to other authorities, are continued to be placed at the foot of the page of the Text or Comment to which they belong.

In printing the Text of LITTLETON, which it has been usual to divide into Sections, it was found necessary to give each Section entire, followed immediately by LORD COKE'S Comment, instead of placing the Section, Translation, and Comment in three collateral columns, as in the former Editions; this arrangement in some instances occasions a slight transposition of a part of a Section into the preceding page, as in the first Section of the work; but this alteration, while it presents a more natural order in reading the original Text and Comment, cannot produce any material inconvenience in referring to and from this work; the references from other books, and from one part to another of the present work, being usually made respectively to the number of the Section of LITTLETON, as in the preceding ANALYSIS, and to the page of

Lord

ADVERTISEMENT.

Lord COKE'S COMMENTARY; which last is therefore accordingly, in the present Edition, always accompanied with the number of the page corresponding with all the former Editions, conspicuously placed in the inner margin.

An INDEX of the Names of Cases cited, stated, or commented upon in the course of the Notes, is now added; as also a more full and comprehensive Index to the subject matter contained in the Notes of the Editors, including those now added in this FIFTEENTH EDITION by Mr. BUTLER.

THE
FIRST PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

Chap. I.

Fee simple.

Sect. I.

[1. a.] **T**ENANT en fee simple est celuy que ad terres ou tenements a tener a luy et a ses heires a tous jours. Et est appel en Latin, feodum simplex, quia feodum idem est quod hæreditas (1), et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima, vel hæreditas pura. Car si home voile purchaser terres ou tenements en fee simple, il covient de aver ceux parolx en son purchase, A aver et tener a luy et a ses heires: car ceux parolx (ses heires) font l'estate d'enheritance. Car si home purchase terres per ceux parolx, A aver et tener a luy a tous jours; ou per tiels parols, A aver et tener a luy et a ses assignes a tous jours: en ceux deux cafes il ny ad estate forsque pur terme de vie, pur ceo que il fault ceux parols (ses heires),
les

TENANT in fee simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawfull or pure. And so *feodum simplex* signifies a lawfull or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heires: for these words (his heires) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assignes for ever: in these two cafes he hath but an estate for term of life, for that there lacke these words
(his

(1) [See N. 1.]

les queux parolx tantselement font
l'estate d'enheritance en tous feoffments
et grants.

(his heires), which words onely make
an estate of inheritance in all feoff-
ments and grants.

Vide Sect. 85.

TENANT," in Latin *tenens*, is derived of the verbe *teneo*, and hath in the law five significations. 1. It signifies the estate of the land: as when the tenant, in a *præcipe* of land, pleads *quod non tenet*, &c. this is as much as to say, that he hath not seisin of the freehold of the land in question. And in this sense doth our author take it in this place: and therefore he saith, *tenant in fee simple* is he which hath lands to hold to him and his heires. 2. It signifieth the tenure or the service whereby the lands and tenements be holden; and in this sense it is said in the writ of right, *quæ clamat tenere de se per liberum servitium*, &c. And in this signification he is called a tenant or holder; because all the lands and tenements in England, in the hands of subjects, are holden mediately or immediately of the king [1. b.] (1). For in the law of England we have not, properly, *allodium*, that is, any subjects land that is not holden; unlesse you will take *allodium* for *ex solido*, as it is often taken in the Booke of *Domesday* (2): and tenants in fee simple are there called *alodarii* or *alcarii*. And he is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a (3) tenant, because he hath no superior but God Almighty; *prædium domini regis est directum dominium, cujus nullus auctor est nisi Deus*. And, as Bracton saith, *Omnes quidem sub eo, et ipse sub nullo, nisi tantum sub Deo*. The possessions of the king are called *sacra patrimonialia*, and *dominica coronæ regis*. But though a subject hath not properly *directum*, yet hath he *utile dominium*. Of these tenants our author speaketh in his second booke. 3. Also, *tenere* signifieth performance, as in the writ of covenant, *quod teneat conventionem*, that is, that he hold or performe his covenant. 4. And likewise it signifieth to be bound, as it is said in every common obligation, *teneri et firmiter obligari*. Lastly, It signifieth to deeme or judge; as in 38. E. 3. c. 4. it shall be holden for none; (that is) judged or deemed for none; and so we commonly say, it is holden in our bookes. And these severall significations doe properly belong to our tenant in fee simple. For he hath the estate of the land, he holdeth the land of some superiour lord, and is to perform the services due, and thereunto he is bounden by doome and judgement of law. Of the severall estates of land our author treateth in his first booke: and beginneth with fee simple, because all other estates and interests are derived out of the same.

8. H. 7. 12.
18. E. 3. 35.
24. E. 3. 65, 66.
44. E. 3. 5.
48. E. 3. 9.
(2. Inst. 501.)
(4. Inst. 192.)
(12. Co. 9. Case
of Stanneries)
Mir. des Just.
c. 1. sect. 3.
Customs de Nor-
mandy, cap. 28.
Le ft. de 16. R.
2. cap. 5.
14. El. Dy. 313.
2. r. Co. 47. in
Alton Wood's
case.
(Cro. Cha. 82.)
Bract. lib. 1.
cap. 8.

Brit. fo. 83.
207, 208.
Fleta, lib. 5. cap.
5. & lib. 3. cap. 8.
Bract. lib. 4. 263.
(4. Inst. 202.)

Domesday. Mir. des Just. cap. 2. sect. 15. 17.

Bract. lib. 2.
cap. 5, 6, 7.

"Fee simple." Fee (4) commeth of the French *fief* (i.e.) *prædium beneficiarium*, and legally signifieth inheritance, as our author him-
selfe

(1) Same doctrine, 50. Ass. pl. 1. post. 65. Plowd. 498. The origin and principle of this doctrine is well explained in Wright's Ten. 58. and 2. Blackst. Comm. 48. ed. 5: See also Wright's Ten. 137. and Mad. Baron. Anglic. 25.

(2) See post. 5. a. For particulars concerning *Domesday Book*, see the books cited in Wright's Ten. 56. in note p. and also an Account of *Domesday Book*, and an Ac-

count of *Danegeld*, both printed by order of the Antiq. Soc. in 1756.

(3) For examples and consequences of this doctrine, see Dy. 154. Plowd. 212. post. 16. a. 6. Co. 5. b. Finch, fol. ed. 7. 2. Ro. Abr. 513, 514. Post. 2. b. n. 4.

(4) For the derivation of the word *Fee* see Wright's Ten. 3. and the books there cited.

selfe hereafter expoundeth it. And simple is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like, *Feodum est quod quis tenet ex quâcunque causâ sive sit tenementum, sive redditus, &c.* In *Domesday* it is called *feodum*. [a] Of fee simple, it is commonly holden that there be three kinds, *viz.* fee simple absolute, fee simple conditionall, and fee simple qualified, or a base fee (5). But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, *viz.* simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. * Hereby it appeareth, that fee in our legall understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee; and in this sense the king is said to be seised in fee. [b] It is also taken as it is holden of another by service, and that belongeth onely to the subject; *Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio, ut si sit qui dicat, talis tenet de me tot feoda per servitium militare.* And Fleta saith, *Poterit unus tenere in feodo quoad servitia, sicut dominus capitalis, et non in dominico; aliis in feodo et dominico, et non in servitio, sicut liberè tenens alicujus.* [c] And therefore if a stranger claim a feignory, and distreyne and avow for the service, the tenant may plead, that the tenancy is *extra feodum*, &c. of him, (that is) out of the feignory, or not holden of him that claimeth it; but he cannot plead *extra feodum*, &c. unlesse he take the tenancy, that is, the state of the land upon him. Of fee in the first sense our author treateth in this first booke; and as it is taken in the second sense, in his second booke: and of the third you shall read in our author, Sect. 13. 643, 644, 645. and plentifully in our books quoted in the margin.

[c] 2. Aff. p. 4. 12. Aff. 38. 12. E. 3. tit. Hors de son fee, 28. 28 Aff. 41. 7. H. 4. 30. 2. H. 6. 1. (9. Co. 20. & 34. b. 2. Inst. 296. Cro. Jam. 127. Hob. 108. Doctr. Plac. 132. 216.)

“*Terres ou tenements.*” Here it is to be observed, that a man may have a fee simple in three kinds of hereditaments, (6) *viz.* reall, personall, and mixt. Reall, as lands and tenements, whereof our [2. a.] author here speaketh. Personall, as king Edward the first, in the thirteenth yeare of his raigne, *concessit Edmundo fratri suo charissimo, quòd ipse et hæredes sui habeant, ad requisitionem suam, in cancellariâ nostrâ et hæredum nostrorum, justiciarios ad placita forestarum, quas idem frater noster habet ex dono domini regis Henrici patris nostri, secundum assis. forestæ tenend’, &c.* In this case the grantee and his heires had a personall inheritance in making of a request to have letters patents of commission to have justices assigned to him to heare and determine of the pleas of the forrests, and concerneth neither lands or tenements. And so it is if an annuity be granted to a man and his heires, it is a fee simple personall: (1) *et sic de similibus.* And lastly, hereditaments mixt both of the realty and personalty. As the abbot of Whitbye in the county of Yorke having a forrest of the gift of William of Percie founder of that abby, and by the charters of

Brit. cap. 34. fo. 89.
Flet. lib. 3. cap. 2. 8, & 9. & lib. 5. cap. 5.
[a] Bract. fo. 263. & 207.
Pl. Com. in Walf. Caf.
7. H. 4. 46.
8. H. 4. 15.
18. H. 8. 3. b.
27. Aff. 33.
18. Aff. 5.
18. E. 3. 46.
24. E. 3. 28.
9. E. 4. 18.
16. H. 7. 4.
10. E. 3. Account 56. 22.
R. 2. Disc. 50.
12. E. 4. 3.
15. E. 4. 8. Dy.
8. El. 252, 253.
12. H. 8. 8.
4. H. 7. 2. The case of a person which hath a qualified fee, fee in the title of Desc.
* Vide Sect. 4.
[b] Bract. lib. 4. fo. 263.
Flet. lib. 5. cap. 5.
Brit. fo. 205. 207.

Rot. pat.
13. E. 1.
(4. Inst. 314.
Cro. Ja. 155.)

(5) See the same division of fee in 10. Co. 97. b. 2. Inst. 96. Vaugh. 273. 2. L. Raym. 1148. and for instances of a qualified fee, see post. 27. Plowd. 557. 10. Co. 97. 7. E. 4. 12. a. Cro. Ch. 430.

Hardr. 147.

(6) For the extent of the word *hereditament*, and the difference between *that* and *tenement*, see post. 6. a.

(1) [See N. 2.]

Ro. Pat. an.
47. H. 3. Trin.
Pickering, 8. E.
3. Ro. 42.

of king John and of other his progenitors, king Henry the third did grant *abbati et conventui de Whitbye, quod ipsi et eorum successores in perpetuum habeant viridarios suos proprios de libertate sua de Whitbye eligend' de cætero in pleno com. Eborum, prout moris est, ad responsiones et præsentationes faciend' de transgressionibus, quas amodo fieri continget de venatione intra metas forestæ suæ de Whitbye, quam habent ex donatione Willi. de Percey et Alani de Percey filii ejus, et redditione et concessione domini Johannis quondam regis Angliæ patris nostri, et confirmatione nostrâ, coram justiciariis nostris itinerantibus ad placita forestæ in partibus illis et non alibi, sicut viridarii forestæ nostræ hujusmodi responsiones et præsentationes facere debent, et consueverunt. Et si contingat aliquos forinsecos, qui non sunt de libertate prædictorum abbatis et conventus, transgressionem facere de venatione intra metas forestæ prædictæ, quos prædicti viridarii attachiare non possunt, Volumus et concedimus pro nobis et hæredibus nostris quod hujusmodi transgressores per justiciarios forestæ nostræ ultra Trentam attachientur, ad præsentationem viridariorum prædict. ad respondendum inde coram justiciariis nostris itinerantibus ad placita forestæ nostræ in partibus illis, cum ibid. ad placitandum venerint prout secundum assisam et consuetudinem forestæ nostræ fuerint faciend'.* Which charter was pleaded upon the claime made by the abbot of Whitbye before Willoughby, Hungerford, and Hanbury, justices in eire in the forrest of Pickering, which eire began anno 8. E. 3. And these before them were allowed. And when the king createth an earl of such a county or other place, to hold that dignity to him and his heires, this dignity is personall, and also concerneth lands and tenements. (2) But of this matter more shall be said in the next Chapter, Sect. 14. and 15.

(7. Co. 33.)

Braet. lib. 4.
cap. 9. fo. 263.
Brit. cap. 32.
& 79.
For interpretation of words and etymologies, vid. Sect. 9. 18. 95.
116. 119. 135.
154. 164. 174.
184. 186. 194. 204. 234. 267. 268. 332. 337. 424. 520. 592. 645. 689. 733.

"*Et est appel en Latin feodum simplex, quia feodum idem est quod hæreditas.*" Here Littleton himselfe teacheth the signification of *feodum*, according to that which hath been said, which only is to be applied to fee simple pure and absolute. And this and all his other interpretations of words and etymologies throughout all his three bookes (wherein the studious reader will observe many) are perspicuous and ever *per notiora, et nunquam ignotum per ignotius*; and are most necessary, for *ignoratis terminis ignoratur et ars*.

Braet. lib. 2.
cap. 39. fo. 92.
62. b. lib. 4.
cap. 28.
Fleta, lib. 3.
cap. 8.
Braet. lib. 2.
cap. 5. &c. Britt. cap. 34.

"*Simplex idem est quod legitimum vel purum.*" Hereof he treateth onely in this place. And Littleton saith well, that *simplex idem est quod purum. Simplex enim dicitur quia sine plicis; et purum dicitur, quod est merum et solum sine additione. Simplex donatio et pura est, ubi nulla addita est conditio sive modus; simplex enim datur, quod nullo aditamento datur.*

Fleta, lib. 2. ca. 3.
Plowd. 58. b.

"*Hæreditas legitima vel hæreditas pura.*" And therefore it is well said, quod *donationum alia simplex et pura, quæ nullo jure civili vel naturali cogente, nullo precedente metu vel interveniente, ex merâ gratuitâque liberalitate donantis procedit, et ubi nullo casu velit donator ad se reverti quod dedit; alia sub modo, conditione, vel ob causam, in quibus casibus non propriè fit donatio, cum donator id ad se reverti velit, sed quædam potiùs feodalis dimissio; alia absoluta et larga; alia stricta et coarctata, sicut certis hæredibus, quibuscumque à successione exclusis, &c.*

And

(2) Therefore such dignity has been adjudged to be intailable within the statute *de donis*. See post. 20. a.

And therefore seeing fee simple is *hereditas legitima vel pura*, it plainly confirmeth that the division of fee is by his authority rather to be divided as is aforesaid than fee simple. And he saith well in the disjunctive, *legitima vel pura*, for every fee simple is not *legitimum*. For a disseisor, abator, intruder, usurper, &c. have a fee simple, but it is not a lawfull fee. So as every man that hath a fee simple, hath it either by right or by wrong. If by right, then he hath it either by purchase or descent. If by wrong, then either by disseisin, intrusion, abatement, usurpation (3), &c. In this Chapter he treateth onely of a lawfull fee simple, and divideth the same as is aforesaid.

“*Car se home purchase.*” Persons capable of purchase are of two sorts, persons natural created of God, as *I. S. I. N. &c.* and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, *viz.* either sole, or aggregate of many: again, aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655, shall be shewed. Some men have capacitie to purchase, but not abilitie to hold: some, capacity to purchase, and abilitie to hold or not to hold, at the election of them or others: some, capacitie to take and to hold: some, neither capacitie to take nor to hold: and some, specially disabled to take some particular thing.

[2. b.] If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the escheat, and not the king. But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as necessary to his trade or traffique, and not for the benefit

Persons capable of purchase.

Who have ability to grant.
Vide Sect. 57.

11. Eliz.
Dier 283.
11. H. 4. 20.
& 26.
7. E. 4. 29.
(1. Ro. Abr.
194.)

32. Hen. 6. 23.
Pl. Com. 483.

5. Mar. Br. tit.
Denizen. 22.

(3) For the difference between such estates by wrong, see post. 277. a. and that they cannot be said to be by purchase, see post. 3. b. & 18. b.

[2. b.]

- (1) [See N. 3.]
(2) [See N. 4.]
(3) [See N. 5.]

(4) See N. 6.]

(5) See in Plowd. 229. several cases, in which, for a like reason, the king is intitled without office.

(6) Accord. 7. Co. Calvin's case, Dy. 2. b. in marg.

- (7) [See N. 7.]
(8) [See N. 8.]

Pasch. 29. Eliz.
in Sir James
Croft's case.
49. Aff. pl. 2.
49. E. 3. 11.
(5. Co. 52. b.)

Magna Charta,
cap. 36.
7. E. 1. stat. 2.
de Religiosis.
W. 2.
13. E. 1. cap. 33.
15. R. 2. cap. 5.
23. H. 8. cap. 10.
39. El. cap. 5.
23. H. 3.
Aff. 436.
29. Aff. p. 17.
Britt. fo. 32.
Fleta, lib. 3.
cap. 4, & 5.
19. E. 2. tit.
Vill. 34.
29. E. 3. Ibid. 13.
21. E. 3. 5.
4. H. 6. 9.
19. H. 6. 63. 65.
3. E. 4. 14.
19. E. 3.
Mortm. 8.
34. H. 6. 37.
19. H. 6. 63.
(Plowd. 502. a.)
7. E. 4. 14.
* Pl. Com. 193.
in Wroteslye's
case.
Le statut. de
Religiosis.
7. E. 1. ft. 2.

benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9); and so it is if he be an alien enemy. And all this was so resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29. of the raigne of queene Elizabeth. Also, if a man commit felony, and after purchase lands, and after is attainted, he had capacite to purchase, but not to hold it; for in that case the lord of the fee shall have the escheat (10); and if a man be attainted of felony, yet he hath capacity to purchase to him and to his heires, albeit he can have no heire, but he cannot hold it; for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacite to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiasticall or temporall (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacity to take but not to retaine (unlesse they have a sufficient licence in that (11) behalfe); for within the yeare after the alienation, the next lord of the fee may enter; and if he doe not, then the next immediate lord from time to time to have half a yeare; and for default of all the mesne lords, then the king to have the land so aliened for ever, which is to be understood of such inheritance as may be holden. But of such inheritances as are not holden, as villeines, rent charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity graunted to them is not mortmaine, because it chargeth the person only. Some have said that it is called mortmaine, *manus mortua, quia possessio eorum est immortalis, manus pro possessione, et mortua pro immortalis*, and the rather, for that by the laws and statutes of the realme, all ecclesiastical persons are restrained to alien. * Others say it is called *manus mortua per antiphrasin*, because bodies politique and corporate never die. Others say that it is called mortmaine by resemblance to the holding of a man's hand that is ready to die, for what he then holdeth he letteth not goe till he be dead. These and such others are framed out of wit and invention; but the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself, *per quod quæ servitia ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisa fuerunt, indebitè subtrahuntur, et capitales domini eschaetas suas amittunt*, so as the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-services for the defence of the realme, wards, marriages, relieves, and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service.

I passe over villeins or bondmen, who have power to purchase lands, but not to reteyne them against their lords, because you shall reade at large of them in their proper place in the Chapter of Villenage.

(Cro. Ja. 320:
1. Ro. Abr. 731.)

An infant or *minor* (whom we call any that is under the age of 21 years) hath, without consent of any other, capacity to purchase, for it is intended for his benefit, and at his full age he may either agree

(9) [See N. 9.]

(10) [See N. 10.]

(11) As to this, see post. 98. 20.

agree thereunto, and perfect it, or without any cause to be alledged, waive or disagree to the purchase; and so may his heires after him, if he agreed not thereunto after his full age.

A man of non-sane memory may, without the consent of any other, purchase lands, but he himselfe (12) cannot waive it; but if he die in his madnesse, or after his memory recover, without agreement thereunto, his heire may waive and disagree to the state, without any cause shewed; and so of an ideot. But if the man of non-sane memory recover his memory, and agree unto it, it is unavoydable.

If an abbot purchase lands to him and his successors without the consent of his convent, he himself cannot waive it, but his successor may upon just cause shewed; as if a greater rent were reserved thereupon than the value of the land, or the like; but he cannot waive it unlesse it be upon just cause, *et sic de similibus, prælatus ecclesiæ suæ conditionem meliorare potest, deteriorare nequit.* And in another place he saith, *Est enim ecclesia ejusdem conditionis, que fungitur vice minoris.* But no simile holds in every thing, according to the ancient saying, *Nullum simile quatuor pedibus currit* [a]. An hermaphrodite may purchase according to that sexe which prevaieth. A feme covert cannot take any thing of the gift of her husband (1), but is of capacity to purchase of others without the consent of her husband. And of this opinion was *Littleton* in our books, and in this book, Sect. 677. but her husband may disagree thereunto, and devest the whole estate; but if he neither agree nor disagree, the purchase is (2) good; but after his death, albeit her husband agreed thereunto, yet she may without any cause to be alledged waive the same, and so may her heires also, if after the decease of her husband she herselfe agreed not thereunto.

[b] A wife (*uxor*) is a good name of purchase, without a Christian name; and so it is if a Christian name be added and mistaken, as *Em for Emelyn, &c. for utile per inutile non vitiatur.* But the queene, the consort of the king of England, is an exempt person from the king by the common law, and is of ability and capacity to purchase and grant without the king. Of which see more at large, Sect. 200.

F. N. B. 97. a. 1. Aff. 11. 11. H. 4. 33. 9. E. 4. 49. 13. E. 3.

[c] The parishioners or inhabitants, or *probi homines* of Dale (3), or the churchwardens, are not capable to purchase lands; but goods they are, unlesse it were in ancient time when such grants were allowed (4).

(d) An ancient grant by the lord to the commoners in such a waste, that a way leading to their common should not be straitened, was good; but otherwise it is of such a grant at this day [e]. And so in ancient time a grant made to a lord, *et hominibus suis, tam liberis quam natiuis*, or the like, was good; but they are not of capacity to purchase by such a name at this day. But yet at this day if the king grant to a man to have the goods and chattels *de hominibus suis*, or *de tenentibus suis*, or *de residentibus infra feodum, &c.* it is good: for there they are not named as purchaters or takers,

but

(12) [See N. 11.]

(1) [See N. 12.]

(2) Acc. post. 356. a.

(3) See in Dy. 100. the case of a grant

by the crown *probis hominibus de Islington*, rendering a rent.

(4) [See N. 13.]

43. Aff. p. 23.

Bract. lib. 2.
fo. 12. & 32.

[a] 1. H. 7. 16.
7. H. 4. 17.
18. H. 6. 8.
9. E. 3. 30.
15. E. 4. fol. 1. b.
27. H. 8. 24.
(Hob. 204.
5. Co. 119. b.)

[b] A name of
purchase.
2. H. 4. 25.
1. H. 5. 8.
46. E. 3. 22.
12. Aff. 18.
30. E. 3. 18.
Estoppel. 231.

[c] 12. H. 7. 8.
37. H. 6. 30.
10. H. 4. 3. b.
(4. Inst. 297.)

[d] 32. E. 3.
barre, 261.
(Hob. 86.
6. Co. 59.)
[e] 34. E. 3.
grant 83.
18. E. 3. 50.
12. Aff. 35.
14. H. 6. 12.
34. Aff. p. 11.
40. Aff. p. 21.

[f] Bract. lib. 4.
tract. 1. ca. 20.
Britton, fol. 121,
122. 3. E. 3. 78.
25. E. 3. 43.
26. Aff. 61.
30. Aff. 16.
46. E. 3. 22.
39. E. 3. 17.
3. H. 6. 25.
19. H. 6. 2.
30. H. 6. 1.
34. H. 6. 19.
11. H. 4. 27.
9. E. 4. 29.

5. E. 4. 46. 65. 14. H. 7. 11. 20. Eliz. Dier 259. 8. E. 3. 436. 20. E. 3. 25. 1. H. 4. 5.
3. H. 6. 26. 19. H. 6. 2. 34. H. 6. 19. 5. E. 4. 55. 27. H. 8. 11. 1. H. 5. 5. 18. E. 3. 32.
27. E. 3. 85. 8. E. 3. 427. 7. H. 6. 29. 9. H. 5. 9. [g] 40. E. 3. 22. Fitzwilliam. 24. E. 3. 64.
Fitzjohn. 39. E. 3. 24. Fitzrobert. 27. E. 3. 85. tit. grant. 67. 18. E. 3. 23, 24. 18. E. 4. 8. b.
14. H. 7. 31, 32. 13. E. 4. 8. 5. E. 3. Vouch. 179. 37. E. 3. 85. where the proper name is
mistaken. (6. Co. 65. 10. Co. 132. b. Hob. 32. 2. Ro. Abr. 44. Mo. 232.)

but for another man's benefit, who hath capacity to purchase or take [f]. And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that speciall heed bee taken to the name of baptism; for that a man cannot have two names of baptism as he may have divers surnames (5). [g] And it is not safe in writs, pleadings, grants, &c. to translate surnames into Latin. As if the surname of one be Fitzwilliam, or Williamson, if he translate him *Filius Willi.* if in truth his father had any other Christian name than William, the writ, &c. shall abate; for Fitzwilliam or Williamson is his surname, whatsoever Christian name his father had, therefore the lawyer never translates surnames. And yet in some cases, though the name of baptism be mistaken (as in the case before put of the wife), the grant is good.

So it is if lands be given to Robert earl of Pembroke where his name is Henry, to George bishop of Norwich where his name is John, and so of an abbot, &c. for in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken. If by licence lands be given to the deane and chapter of the holy and undivided Trinity of Norwich, this is good, although the deane be not named by his proper name, if there were a deane at the time of the grant; but in pleading he must shew his proper name. And so on the other side, if the deane and chapter make a lease without naming the deane by his proper name, the lease is good, if there were a deane at the time of the (6) lease; but in pleading, the proper name of the deane must be shewed; and so is the booke of 18. E. 4. to be intended; for the same judges in 13. E. 4. held the grant good to a maior, aldermen, and commonalty, albeit the maior was not named by his proper name; but in pleading it must be shewed, as is there also holden (7). If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of sir Francis Gawdie, late chiefe-justice of the court of common-pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in *anno* 36. Hen. 8. he did beare, and after used in all his purchases and grants (8). [b] And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names. And the court said, that it may be that a woman was baptized by the name of Anable, and 40 yeares after she was confirmed by the name of Douce, and then her name was changed, and after she was to be named Douce, and that all purchases, &c. made by her by the name of baptism before her confirmation remain good; a matter not much

[b] 22. R. 2.
briefe 936.
12. R. 2.
feoffments 58.
9. E. 3. 14.
46. E. 3. 21.
3. H. 6. 26.
34. H. 6. 19.
1. H. 7. 29.
5. E. 2. briefe 741.
14. H. 7. 11.

(5) See Cro. Eliz. 27. 222. 328. Cro. See 21. E. 4. 15. 16.

Jam. 558.

(7) See 1. Leon. 307. Dy. 86.

(6) But not otherwise, post. 264. a.

(8) Acc. 2. Ro. Abr. 135. A.

much in use, nor requisite to be put in ure, but yet necessary to be knowne. [i] But purchases are good in many cases by a knowne name, or by a certaine description of the person without either surname or name of baptism, as *uxori I. S.* as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo I. S.* or *seniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis seu exitibus* of *I. S.* or to the right heires of *I. S.*

Counter-plea de vouch. 43. 35. Aff. 13. 37. H. 6. 30. 11. E. 4. 2. 7. H. 4. 5. 40. E. 3. 9. 37. H. 8. Bro. Nofme 40.

[k] But if a man do infranchise a villein *cum totâ sequelâ suâ*, that is not sufficient to infranchise his children borne before, for the uncertainty of the word *sequela*. [l] But regularly in writs, the demandant or tenant is to be named by his Christian name and surname, unlesse it be in cases of some corporations or bodies politique (9).

[3. b.] [a] A bastard having gotten a name by reputation may purchase by his reputed or knowne name to him and his heires, although he can have no heir but of his body. A man makes a lease to *B.* for life, remainder to the eldest issue male of *B.* and the heires males of his body. *B.* hath issue a bastard son, he shall not take the remainder, because in law he is not his issue; for *qui ex damnato coitu nascuntur inter liberos non computentur*. And as *Littleton* saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soone as he is borne. [b] So it is if a man make a lease for life to *B.* the remainder to the eldest issue male of *B.* to be begotten of the body of *Jane S.* whether the same issue be legitimate or illegitimate. *B.* hath issue a bastard on the body of *Jane S.* this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had beene no other words, he could not take; and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation, (1) that he is the sonne of *B.* &c. [c] And therefore he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder limited to him by the name of the son of his reputed father, is good; but if he cannot take the remainder by the name of issue at the time when he is borne, he shall never take it. And so it seemeth, and for the same cause, if after the birth of the issue *B.* had married *Jane S.* so as he became bastard eigne, and had a possibility to inherit, yet he shall not take the remainder.

Persons deformed having human shape (2), ideots, madmen, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures, have power to purchase and retaine lands or tenements.

[d] But the common law doth disable some men to take any estate in some particular things; as if an office either of the grant of the king or subject which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safetie of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely (3)

void,

(9) As to naming of persons in writs and pleadings, see *Thelo. Dig. Br. Orig. lib. 3.* and 6. and the title *Abatement* in *Com. Dig.*

(1) [See N. 14.]

(2) Who ought to be deemed such, see post. 7. b. 25. b.

(3) See acc. *Godb. 391.* *Hardr. 130.* *Scrogg's case*, cited by lord Coke in the margin, is in *Dy. 175.*

[i] 17. E. 3. 29.
18. E. 3. 59.
30. E. 3. 18.
11. H. 4. 84.
Pl. Com. 525.
21. R. 2. devise.
41. E. 3. 19.
15. E. 3.

[k] 15. H. 7. 14.

[l] 8. E. 3. 437.
29. E. 2. 44.
19. E. 4. 11.
21. E. 4. 19.
7. H. 6. 29.

[a] 39. E. 3.
11. 24.
17. E. 3. 42.
35. Aff. 13.
41. E. 3. 19.

Vide Sect. 118.

[b] So it was resolved, *M. 38.* & 39. *Eliz.* in *Bre. de errore*, for land in *Portington* in *com. Salop.* (*S. C. Cro. Eliz. 509.* *Noy 35.* *Mo. 430.* 2. *Ro. Abr. 43.* 44.)

[c] 39. E. 3.
11. 24.
35. Aff. 13.
41. E. 3. 10.
17. E. 3. 42.
(6. *Co. 66.*)

[d] 5. E. 4. tit. office & officer. *Bro. 48.* *Vinter's case*, 5. *Mar. Dier.* fo. 150. b. & *Scrogg's case.* (*Hob. 148.*)

(Cro. Jam. 17.) void, and the partie disabled by law, and incapable to take the same, *pro commodo regis et populi*; for onely men of skill, knowledge, and ability to exercise the same are capable of the same, to serve the king and his people. [e] An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (4). [f] No man, though never so skilful and expert, is capable of a judiciall office in reversion (5), but must expect untill it fall in possession. And see Sect. 378. where bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, shall make such a purchaser incapable thereof; which is worthy to be knowne, but more worthy to be put in due execution.

[e] M. 40. & 41. Eliz. in the King's Bench between Scamler and Walters. (Contra March. 43. S. C. W. Jo. 310. Cro. Car. 279. 555.) [f] 11. Co. 2. in Auditor Curle's case. (5. & 6. E. 6. c. 15. & post. 234. a.) Vide Sect. 378. 1. H. 7. 31. (Post. 7. b. 29. b.) [g] Bract. lib. 5. fo. 421. 415. Britt. cap. 22. 39. Fleta. lib. 6. cap. 41. 1. E. 3. 9. 44. E. 3. 4. 3. H. 6. 24. 21. R. 2. judgement 263. 7. H. 4. 2. 14. H. 8. 16. Doct. & Stud. 141. Pl. Com. fo. 47. Brit. cap. 33. (Post. 76. a.)

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves; as the king is capable of an office, not to use but to grant, &c. (6)

A monster borne within lawfull matrimonie, that hath not human shape, cannot purchase, much lesse reteine any thing. [g] The same law is *de professis et mortui sæculo*, for they are *civiliter mortui* (7); whereof you shall read at large in his proper place, Sect. 200.

[g] Bract. lib. 5. fo. 421. 415. Britt. cap. 22. 39. Fleta. lib. 6. cap. 41. 1. E. 3. 9. 44. E. 3. 4. 3. H. 6. 24. 21. R. 2. judgement 263. 7. H. 4. 2. 14. H. 8. 16. Doct. & Stud. 141. Pl. Com. fo. 47. Brit. cap. 33. (Post. 76. a.)

"Purchase," in Latin *perquisitum*, of the verbe *perquirere*. Littleton describeth it in the end of this Chapter in this manner: *Item, purchase est appel le possession de terres ou tenements que home ad per son fait, ou per son agreement, a quel possession il n'avient per title de discent de nul de ses ancesters ou de ses cosens, mes per son fait demesne*. So as I take it, a purchase is to be taken, when one commeth to lands by conveyance or title; and that disseins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (8), but oppressions and injuries.

Note, that purchasers of lands, tenements, leases, and hereditaments for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges, and limitations of uses, of or out of the same, [b] by a statute made since Littleton wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will adde this case. I. C. had a lease of certaine lands, for 60 yeares, if he lived so long, and forged a lease for 90 yeares absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease and all his interest in the land to R. G. It seemed to me that R. G. was no purchaser within the statute of 27. Eliz. for he contracted not for the true and lawfull interest, for that was not knowne to him; for then perhaps he would not have dealt for it, and the visible and knowne tearme was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for it. And of this opinion were all the judges in Serjeants-Inne, in Fleet-street.

[i] In ancient time, when a man made a fraudulent feoffement, it was said, *quod posuit terram illam in brigam*; where *brigam* doth signifie wrangle, contention, or intricacy, for fraud is the mother of them all. [k] And on the other side, purchases, estates, and contracts

[b] 27. Eliz. cap. 4. 13. Eliz. cap. 5. 3. Co. 80. 82, 83. Twine's case. 5. Co. 60. Gooche's case. 6. Co. 72. Burrell's case. 11. Co. 74. Pasch. 12. Ja. inter Jones pl. and sir Rich. Groobham def. in ejectione firmæ in evidence al Jurie. [i] Hil. 18. E. 3. coram rege in Thesaur. [k] 37. H. 8. cap. 6.

(4) [See N. 15.]

(5) [See N. 16.]

(6) See as to this, Plowd. 381.

(7) [See N. 17.]

(8) Accord. ante 2. b. and post. 18. b.

(9) For cases of fraudulent gifts before the 23. Eliz. c. 5. see Dy. 294. b. and 295. a.

[4. a.]

tracts may be avoided, since *Littleton* wrote, by certaine acts of parliament against usurie above ten in the hundred, in such manner and forme as by those acts is provided; which statutes are well expounded in my books of Reports, which may be read there. To them that lend money my caveat is, that neither directly nor indirectly, by art, or cunning invention, they take above ten (1) in the hundred: for they that seeke by sleight to creepe out of these statutes, will deceive themselves, and repent in the end.

“*Purchase terres.*” *Littleton* here and in many other places putteth lands but for an example; for his rule extendeth to feignories, rents, advowsons, commons, estovers, and other hereditaments, of what kind or nature soever.

“*Terre,*” *Terra*, Land, in the legall signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, waters, marishes, furses, and heath. *Terra est nomen generalissimum, et comprehendit omnes species terræ*; but properly, *terra dicitur à terendo, quia vomere teritur*; and anciently it was written with a single *r*; and in that sense it includeth whatsoever may be plowed; and is all one with *arvum ab arando*. It legally includeth also all castles, houses, and other buildings: for castles, houses, &c. consist upon two things, *viz.* land or ground, as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith. * Land is anciently called *Fleth*; but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedence to be demanded in the first place in a (2) *præcipe*, as hereafter shall be said. And therefore this element of the earth is preferred before the other elements: first and principally, because it is for the habitation and resting-place of man; for man cannot rest in any of the other elements, neither in the water, ayre, or fire. For as the heavens are the habitation of Almighty God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man; *Cælum cæli domino, terram autem dedit filiis hominum*: All the whole heavens are the Lord’s, the earth hath he given to the children of men. Besides, every thing, as it serveth more immediately or more meerly for the food and use of man (as shall be said hereafter), hath the precedent dignity before any other. And this doth the earth; for out of the earth commeth man’s food, and bread that strengthens man’s heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerfull countenance; and therefore *terra olim Ops mater dicta est, quia omnia hæc opus habent ad vivendum*. And the divine agreeth herewith; for he saith, *Patriam tibi et nutricem, et matrem, et mensam, et domum posuit terram Deus, sed et sepulchrum tibi hanc eandem dedit*. Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe* (3); but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terræ aquâ coopertas*: and besides, the earth doth furnish man with many other necessities for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, leade, and other metals, and also with a great varietie of precious stones, and many other things for profit, ornament, and pleasure. And lastly,

13. Eliz. cap. 8.
5. Co. 69.
Barton’s case.
Eodem lib. 7.
Claiton’s case.
(Lutw. 271.)
(5. Co. 69.)

Lands and other things to be purchased.

Pl. Com. 168. b.
and 170. a. and
151. 4. Co. 87. b.
Lutterel’s case.
4. E. 3. 161. and
6. E. 3. 283.
8. E. 3. 377.
Temps E. 1.
Briefe 811.
28. H. 8.
Dyer 47.

* Tr. 7. E. 3.
coram rege
Northampton in
Thesaur.

Psal. 115. 16.

Psal. 104. 35.

Chrisost. hom. 30

(Plowd. 313.)

(1) [See N. 18.]

and 4. Co. 39. a.

(2) Acc. Fitzh. Nat. Br. 2. C. Post. 4. b.

(3) Acc. Yelv. 143. See post. 4. b.

the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cælum*, as is holden 14. H. 8. fo. 12. 22. Hen. 6. 59. 10. E. 4. 14. *Registrum origin.* and in other bookes.

And albeit land, whereof our author here speaketh, be the most firme and fixed inheritance, and therefore it is called *solum*, *quia est solidum*, and fee simple the most highest and absolute estate that a man can have; yet may the same at severall times be moveable, sometime in one person, and *alternis vicibus* in another; nay sometime in one place, and sometime in another. As for example, if there be 80 acres of meadow which have beene used time out of mind of man to be divided betweene certaine persons, and that a certaine number of acres appertaine to every of these persons; as for example, to A. 13 acres, to be yearely assigned and lotted out, so as sometime the 13 acres lie in one place, and sometime in another, and so of the rest; A. hath a moveable fee simple in 13 acres, and may be parcell of his mannor, albeit they have no certaine place, but yearely set out in severall places, so as the number only is certaine, and the particular acres or place wherein they lie after the year incertaine. And so it was adjudged in the king's bench upon an especiall verdict (4).

If a partition be made betweene two coparceners of one and the selfe-same land, that the one shall have the land from Easter untill Lammas to her and to her heires, and the other shall have it from Lammas till Easter to her and her heirs, or the one shall have it the first yeare, and the other the second year, *alternis vicibus*, &c. there it is one selfe-same land wherein two persons have severall inheritances at severall times. So it is if two coparceners have two severall manors by descent, and they make partition, that the one shall have the one mannor for a year, and the other the other mannor for the same yeare, and after that yeare then she that had the one mannor shall have the other, *et sic alternis vicibus* for ever; and albeit the manors be severall, yet are they certaine, and therefore stronger than Bridgewater's case; so as this doth make a division of states of inheritances of lands, *viz.* certaine or unmoveable, whereof Littleton here speaketh, and incertaine and moveable, whereof these three cases for examples have beene put. Wherein it is to be noted, that the possession is not onely severall, but the inheritance also. It is also necessary to be seene by what names lands shall passe. [a] If a man hath 20 acres of land, and by deed granteth to another and his heires *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land it selfe shall not passe (1), because he hath a particular right in the land; for thereby he shall not have the houses, timber-trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action of trespass *quare clausum fregit*. [b] The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit*; but by grant thereof and livery made, the soile shall not passe, as is aforesaid. [c] If a man let to B. the herbage of his woods, and after grant all his

[4. b.]

Vide Sect. 59. where in this case livery shall be made. (Post. 48. b. 7. Co. 5.)

Vide Sect. 643. how these 13 acres may be charged. (1 Ro. Abr. 829. Cro. Eliz. 421.) Hill. 34. Eliz. Rot. 489. in transf. inter Weldon & Bridgewater in Banco Regis. Temps E. 1. tit. partition. 21. (2) F. N. B. 62. l. Vide 1. Co. 87. per Walmsh. F. N. B. 62. K. (3) (Post. 167. a. 7. Co. 5.)

Vide Sect. 114. where advowsons, &c. may be appendant and in gross. By what names, &c. lands, &c. shall passe. [a] Vide Sect. 289. (Post. 186. b. Contra 1. Ventr. 393.) 14. H. 8. 6. 4. H. 7. 3. 10. H. 7. 24. 11. H. 7. 21. 14. H. 7. 4. 6. 21. H. 7. 36, 37. 9. H. 6. 52. 27. H. 6. 35. 22. E. 4. barre 116. 11. H. 4. 90. 18. E. 3. Execution 56. 4. E. 3. 48. 8. E. 3. 13. 9. Aff. p. 12. 38. E. 3. 24. [b] Bract. fo. 222. 17. E. 3. 75. 39. H. 6. 38. 11. Eliz. Dy. 285. (4. Co. p. 43. Post. 47. a. Cro. Cha. 362. Noy. 54.) [c] Pasch. 12. Ja. inter Duckwray & points in evidence at Jury in Banke le Roy.

his lands in the tenure, possession, or occupation of *B.* the woods shall passe, for *B.* hath a particular possession and occupation, which is sufficient in this case; and so it was resolved. [*d*] So if a man be seised of a river, and by deed doe grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soile doth not passe (2), nor the water, for the grantor may take water there; and if the river become drie, he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made secundum formam chartæ, cannot enlarge the grant. [*e*] For the same reason, if a man grant *aquam suam*, the soile shall not passe, but the pischary (3) within the water passeth therewith. And land covered with water shall be demanded by the name of so many acres *aquâ* (4) *coopertas*; whereby it appeareth that they are distinct things. [*f*] So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, because but part of the profit is given, for trees, mines, &c. shall not passe. [*g*] But if a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartæ*, the whole land itselfe doth passe; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, and all whatsoever parcell of that land doth passe (5).

(2. Ro. Abr. 2.)

[*e*] Tr. 11. R. 2. in tresp. nient Imprimee ne abridge. 11. H. 7. 4.

[*f*] 7. E. 3. 342. 5. Aff. 9, 10. 7. Aff. 9.

[*g*] 45. E. 3. tit. feoffments et faits 90.

14. H. 8. 6. Pl. Com. 541. b. F.N.B. 8. 12. E. 3. Dower 90.

[*b*] By the grant of the boillourie of salt, it is said that the soile shall passe, for it is the whole profit of the soile. And this is called *saliva*, of the French word *salure* for a salt-pit; and you may read *de saliva* in Domesday, and *selda* signifieth the same thing [*i*]; and where you shall reade in records *de lacertâ in profunditate aquæ salæ*, there *lacerta* signifieth a fathom, A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods; not onely the woods growing upon the land passe, but the land itselfe, and by the same name shall be recovered in a *præcipe*; for *boscos* doth not onely include the trees, but the land also whereupon they grow. [*k*] The same law if a man in that case grant *omnes boscos suos crescentes*, &c. yet the land itselfe shall passe, as it hath beene (6) adjudged. * *Frassetum* signifieth a wood, or ground that is woodie. [*l*] If a man hath a wood of elder-trees containing 20 acres, and granteth to another 20 *acras alneti* (with an *n* not a *v*), the wood of elders and the soile thereof shall passe, but no other kinde of woods shall passe by that name. *Alnetum est ubi alni arbores cresunt* †. And *sullings* are taken for elders. [*m*] *Salicetum* doth signifie a wood of willowes, *ubi salices cresunt*. These trees in our bookes are called *sarwes*. * *Selda* is a wood of fallows, willowes, or withies. A brackie ground is called *filicetum*, *ubi filices cresunt*. A wood of ashes is called *fraxinetum*, *ubi fraxini cresunt*, and passeth

[*d*] Vide Sect. 279. Braet. fo. 208.

40. E. 3. 45.

Pl. Com. 154.

10. H. 7. 24. 28.

7. H. 7. 13.

18. H. 6. 29.

34. H. 6. 43.

20. H. 6. 4.

18. E. 4. 4.

4. E. 3. 48.

1. E. 3. 4.

32. E. 3. Scir.

fac. 100.

22. E. 4. barre

116. 12. H. 3.

Aff. 427.

34. Aff. 11.

13. E. 3.

tit. entrie 57.

20. E. 3.

Briefe 685.

W. 2. c. 24.

[*b*] Aff. p. 12.

9. E. 3. 443.

466. Domesday,

7. R. 1. int.

finis in Theaur.

(1. Sid. 161.)

[*i*] Int. Inquisit.

apud Launcast.

Anno 6. E. 1.

in Theaur.

Mich. 1. H. 5.

coram Rege

Rot. 3. in

Theaur.

[*k*] Tr. 7. Eliz.

in banco regis

5. Co. 11. Ive's

case. 14. H. 8. 1.

46. E. 3. 22.

28. H. 8.

Dyer 19.

32. H. 8. Bro.

reservat. 39.

7. E. 6. Dyer 79.

* Glanvil. lib. 8.

cap. 3.

[*l*] Domesday

Registr. F.N.B. 2

† Hill

[*m*] 8. E. 2. Wast. 111. 7. Aff. 18. 11. Aff. p. 13. 41. E. 3. Wast. 82.

14. E. 3. coram Rege Lanc. in Theaur.

* Inter Inquisit. apud Lanc. in com. Cornubie

coram Justic. Aud. anno 6. E. 1. in Theaur. the B. of Excester's case.

(2) [Sec N. 20.]

(3) Acc. Dav. 55. b.

(4) Sec Acc. Yelv. 143.

(5) Adj. acc. in the case of a devise.

Cro. Eliz. 190.

(6) To know when wood will include the soil, and when not, see Bro. Grants, 167.

Cro. Ja. 487. 524. 2. Ro. Abr. 455.

U. Pl. 1. 3.

by that name; and *lupulicetum*, where hoppes grow; and *arundinetum*, where reeds grow. Some say that *dene* or *denne*, whereof *dena* commeth, is properly a valley or dale. *Dena silvæ*, and the like, [n] as *drofden*, or *drufden*, or *druden*, signifieth a thicket of wood in a valley; for *druf*, or *dru*, signifieth a thicket of wood, and is often mentioned in Domesday. And sometime *dena* or *denia* signifieth, as *villa* and *denne*, a towne.

[n] Domesday.

[o] Camden 460.

151.
[p] Pasch.

44. E. 3. coram
Rege in Thesaur.

[o] *Cope* signifieth a hill, and so doth *larwe*; as *stanlarwe* is *saxens collis*. [p] *Howe* also signifieth a hill. And *hope*, *combe*, and *stow* are valleys, and so doth *clough*. And *dunum* or *duna* signifieth a hill or higher ground, and therefore commonly the townes that end in *dun*, have hills or higher grounds in them, which we call downs. It commeth of the old French word *dun*.

[q] Hill. 13. E. 2.

Lanc. coram.

Rege in Thesaur.

Camden, Brit.

247. Rot. Par.

18. E. 1. 8.

Evesque de Car-

lisle's case.

[r] Pl. Com.

169. a. 4. E. 2.

Briefe: 792, 793.

3. E. 3. 86.

4. E. 4. 1.

27. H. 8. 12.

[s] 20. Aff.

pl. 9.

[q] In our Latin a wood is called *boscus*. *Grava* signifieth a little wood, in old deeds, and *birst* or *hurst* a wood; and so doth *bolt* and *sharwe*. *Twaite* signifieth a wood grubbed up, and turned to arable. *Stethe* or *stede* betokeneth properly a banke of a river, and many times a place, as *stowe* doth; and *wic*, a place upon the sea-shore, or upon a river. *Lea* or *ley* signifieth pasture.

[r] If a man doth grant all his pastures, pasturas, the land itselfe employed to the feeding of beasts doth passe, and also such pastures or feedings as he hath in another man's soile. *Lefwes* or *lesues* is a Saxon word, and signifieth pastures. [s] Between *pastura* and *pascuum*, the legall difference is, that *pastura* in one signification containeth the ground itselfe called pasture, and by that name is to be demanded. *Pascuum*, feeding, is wheresoever cattell are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name.

[t] Pl. Com.

169. a. 13. E. 3.

Briefe 241.

33. E. 3.

Entrie 80.

[u] Domesday.

F. N. B. 2.

Regist.

[t] If a man grant omnia prata sua, all his meadowes, the land itselfe of that kinde passeth: *et dicitur pratum quasi paratum*, because it groweth *sponte* without manurance. [u] A man grants *omnes brueras suas*; the soile where heath doth growe passeth, and may be demanded by that name in a *præcipe*. It is derived from *bruyer*, a French word for heath; and it is called *ros* in the British tongue.

[5. a.]

Roncaria or *runcaria* signifieth land full of brambles and briers, and is derived of *roncier*, the French word which signifieth the same, and as much as *senticetum*. [a] By the grant of *omnes juncarias* or *joncarias*, the soile where rushes do grow doth passe; for *jonc* in French is a rush, whereof *joncaria* commeth. [b] A man grants *omnes ruscaria suas*, the soile where *rusci*, i. e. kneholme, or butchers pricks, or broome doe grow, shall passe, and so in the verse in the Register it is called; but in F. N. B. fol. 2. in the verse *pischaria* is put instead of *ruscaria*. And *jampna* commeth of *jonc* and *nower*, a waterish place, and is all one in effect with *joncaria*. He that granteth *omnes mariscos suos*, all his fennes or marsh grounds doe passe. *Mariscus* is derived of the French word *mares* or *marets*; the Latin word for it is *palus*, or *locus paludosus*. *Mora* is derived of the English word moore, and signifieth a more barren and unprofitable ground than marshes, dangerous for any cattell to go there, in respect of myrie and moorish soyle, neither serves it for getting of turves there. [c] You shall reade in records, that such a man *perquisivit trescent. acr. marette*, &c. This word *marettum* is derived of *mare* the sea, and *tego*, and properly signifieth a moorish and gravelly ground, which the sea doth cover and overflow at a full sea,

[a] Regist.

1. E. 3. 4.

F. N. B. 2.

[b] 16. Aff.

p. 9. Register.

Jampna.

(Cro. Cha. 179.)

[c] Pasch.

41. E. 3. coram

rege Lincoln.

Rot. 28.

sea, and lyeth betweene the high water marke and low water marke, *infra fluxum et refluxum maris*. By grant of these particular kinds, the lands of these particular kinds onely doe passe; but, as hath been said, by the grant of land in generall, all these particular kinds and some others doe passe. *Non mihi si centum lingue sint oraque centum, Omnia terrarum percurrere nomina possem*. And therefore let us turn our eye to generall words, which doe include lands of severall sorts and qualities. [d] By the name of an honor (1), which a subject may have, divers mannors and lands may passe. So by the name of an isle, *insula*, many mannors, lands, and tenements may passe.

[d] Mag. Cart. c. 31. Wallingford Nott. Bolon. Lanc. &c. Trin. 33. E. 1. coram

rege in Thef. honor de Huntingdon. Mich. 9. E. 1. coram rege in Thef. 18. E. 2. Aff. 377. 26. Aff. p. 60. 6. E. 3. 56. 47. E. 3. 21. honor de Peverel. 49. E. 3. 324. honor de Egles. 9. H. 6. 27. 36. H. 8. Dyer 58. honor de Glouc. F. N. B. 265. honor Abbath. de Merle. 5. E. 4. 129. 7. H. 6. 39. 1. E. 3. 4, &c. 13. E. 3. jurisd. 23. 4. Co. 88. Lutterel's case. 5. H. 7. 9. 14. H. 4. in recordo longo. 8. H. 4. Pl. Com. 168. 8. H. 7. 1. 4. E. 4. 16. (4. Inst. 294.)

Holme or *bulmus* signifieth an isle or fenny ground. * A commote is a great seigniory, and may include one or divers mannors.

* 13. E. 3. jurisd. 23.

[e] By the name of a *castle*, one or more mannors may be conveyed: *et è converso*, by the name of a mannor, &c. a castle may passe (2). In *Domesday* I read, *Comes Alanus habet in suo castellatu 200 maneria, &c. præter castellarium habet 43 maneria*; and in that booke a castle is called *castellum*, and *castrum*, and *domus defensibilis*, and *mansus muralis*. [f] But note by the way, that no subject can build a castle or houte of strength imbattelled, &c. or other fortresse defensible, called in law by the names aforesaid, and sometimes *domus kernellata* or *carnellata*, *imbattellata*, *tenellata*, *machecollata*, *messe carnelet*, &c. without the licence of the king, for the danger which might ensue, if every man at his pleasure might do it. And they be called imbattlements, because they are defences against battels in assaults. *Tenellare*, or *tanellare*, is to make holes or loopes in walls, to shoote out against the assailants. *Machecollare*, or *machecoulare*, is to make a warlike device over a gate or other passage like to a grate, through which scalding water, or ponderous or offensive things may be cast upon the assaylants (3). But to returne to the matter from whence upon this occasion we are fallen.

[e] 26. Aff. 54. 29. E. 3. 15. 29. H. 6. travers 4. Braet. fo. 434. 1. E. 3. 4. 5. H. 7. 9. 3. E. 2. Awevry 183. 37. H. 6. 26. 18. H. 6. 11. Lib. rub. scac. fo. 18.

By the name of a towne, *villa*, a mannor may passe. In *Domesday*, *alodium* (in a large sence) signifieth a free mannor (4), and *alodiarum*, or *alodarii*, lords of the same; and *lannemanni* there signifie lords of a mannor, having *socam et facam de tenentibus et hominibus suis*. [g] And by the name of a mannor, divers townes may passe. *Quod olim dicebatur fundus nunc manerium dicitur*. By the name of a ferme or fearme (5), *firma*, houses, lands, and tenements may passe; and *firma* is derived of the Saxon word *feormian*, to feed or releeve; for in ancient time, they reserved upon their leases, cattell and other victuall and provision for their sustenance.

[f] In veter. Mag. Cart. cap. Escheatriæ, fo. 162. Britton cap. 20. Rot. Parliam. 45. E. 3. nu. 34. 6. H. 4. nu. 19. 1. E. 4. cap. 1. Rot. Parliam. 1. E. 3. 2. pars Alano Charleton. 22. E. 3. 2. pars Thoma Barkley, &c. (3. Inst. 201.) [g] Lamb. Ex. post. verb. Ferme. Pl. Com. 195.

[b] Note, a fearme in the north parts is called a tacke, in Lancashire a *fermeholt*, in Essex a *wike*. But the word fearme is the general word, and anciently *fundus* signified a fearme, and some-
time

[b] Pl. Com. 169. Regist. 227. b. Eject. Firmæ.

(1) For the nature of a land honor or barony, see *Mad. Bar. Angl.* 2.

(2) *Acc.* 2. *Inst.* 31.

(3) See further as to castles, *Mad. Baron. Anglican.* 17. to 20. *Discours.* by Emin.

Antiq. ed. 1773. v. 1. p. 100. 186. and 191.

(4) See ante, 1. b.

(5) See 2. *Inst.* 145.

[i] 17. E. 3. fo. 8. time land. [i] Lands making a knight's fee (6), shall passe by the grant of a knight's fee *de uno feodo militis*.
5. E. 3. 213.
16. E. 3. bre. 165. 12. E. 2. bre. 814.

[k] 4. E. 3. 161. [k] *Unum solinum* or *solinus terræ* in Domesday booke containeth two plow-lands and somewhat lesse than an halfe; for there it is said, *septem solini*, or *solina terræ sunt 17 carucat'* (7). *Una hida seu carucata terræ*, which is all one as a plow-land, viz. as much as a plow can (8) till. *Sullerye* also signifieth a plow-land. *Una virgata terræ*, a yard-land (the Saxons called it *girdland*, and now the *g* is turned to a *y*), is in some countries 10, in some 20, in some 24, in some 30, &c. (9). [l] *Una bovata terræ*, an oxgange, or an ox-gate of land, is as much as an ox can till (10). [m] But *carucata terræ* and *bovata terræ* are words compound, and may containe meadow, pasture, and wood necessary for such tillage. *Jugum terræ* in Domesday containeth halfe a plow-land. And by all these names, in the raigne of R. i. lands were usually demanded, and long after (11).

[l] 5. E. 3. fine 49. 13. E. 3. fine 67. 39. H. 6. 8. 4. E. 3. 159. 8. E. 3. 377. Bracton fo. 180. 269. 431. 5. H. 3. Droit 66. Pl. Com. 168. [m] 13. E. 3. bre. 241. 2. E. 3. 57. temps E. i. bre. 811. Pl. Com. 168.

[n] Pl. Com. 169. Linwood. 44. E. 3. 21. 4. E. 3. 32. [n] By the name of a grange, *grangia*, a house or edifice, not onely where corne is stored up like as in barnes, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattell, and a *curtilege*, and the close wherein it standeth, shall passe; and it is a French word, and signifieth the same as we take it (12).

[o] 4. E. 3. tit. 1. Feoffments et Faits 79. 14. E. 3. Formedon 34. 34. Aff. pl. 11. [o] 13. E. 3. 4. 4. E. 3. 143. 8. E. 3. 381. 10. E. 3. 482. 13. E. 3. entry 57. F. N. B. 191. h. Domesday. [o] *Stagnum*, in English a poole, doth consist of water and land; and therefore by the name of *stagnum* or a poole, the water and land shall passe also. [a] In the same manner *gorges*, a deepe pit of water, a gors or gulfe, consisteth of water and land; and therefore by the grant thereof by that name the soile doth passe, and a *præcipe* doth lie thereof, and shall lay his esplées in taking of fishes, as breames and roches. In Domesday it is called *guort*, *gort*, and *gors* plurally; as for example, *de 3 gors mille anguilleæ*.

[5. b.]

[b] Temps E. i. bre. 861. [b] So it is of a forest, parke, chafe, vivarye, and warren in a man's owne ground, by the grant of any of them not onely the privilege, but the land itselfe passes, for they are compound. In the booke of Domesday, that is called *lewad*, and *leuga*, and *lewed*, and *leave*, which in Latin is called *leuca*.
4. E. 3. 5. 10. H. 7. 30. 44. E. 3. 12. 43. E. 3. 24. 35. H. 6. 55. 3. H. 6. 2. Domesday. Bracton lib. 4. fo. 235. Int. adjudicat. coram rege p. 39. E. 3. lib. 3. 10. 95. in Theaur. (4. Inst. 289.)

Stadium,

(6) As to the contents of a knights fee, see post. 69.

(7) Some think, that *solinus terræ* was frequently synonymous with *carucata terræ*. See Sonn. Rom. Ports 82. Cow. Interpr. ed. 1727, voc. *solinus terræ*.

(8) See further as to this, post. 69. and 86. b.

(9) See post. 69.

(10) See post. 69.

(11) See further on the dimensions of

land in England, post. 200. b. and 69. Crompt. on Courts, 222. and Disc. by Emin. Antiq. ed. 1773. v. 1. p. 39. to 50. and 107. 195. and 197.—By what names, and in what order, lands, &c. ought to be demanded, see post. 5. b. Fitzh. N. Br. 2. C. Hugh. Comment. on Orig. Writs 2. and Thelwall's Dig. Br. Orig. l. 8. c. 1. p. 118. and particularly the latter book.

(12) *Grange* sometimes comprehends a whole *farm*. See 4. Co. 48. b.

[c] *Stadium*, or *ferlingus* sive *ferlingum*, or *quarentena terræ*, is a furlong of land, and is as much as to say, a furrow long, which in ancient time was the eighth part of a mile; and land will passe by that name. And some hold that by that name land may be demanded. And *de ferlingis et quarentenis*, you shall read divers times in the book of Domesday; and there you shall read, *in insulâ rex habet unum frustum terræ unde exeunt sex vomeres. Nota, frustum significeth a parcell.* [d] *Warectum*, or *wareccum*, or *varectum*, doth signifie fallow; *terra jacet ad warectum*, the land lyeth fallow: but in truth the word is *vervactum*, *quasi verè novo victum seu subactum*, *terra novalis seu requieta, quia alternis annis requiescat* [e], *tam culta novalia.* [f] By the grant of a messuage, or house, *mesuagium*, the orchard, garden, and curtilage doe (1) passe; and so an acre or more may passe by the name of a house: it is derived of the French word *mesé*. [g] In Domesday, a house in a city or burrough is called *baga*; other houses are called there *mansiones*, *mansuræ*, and *domus* [b]; and in an ancient plea concerning Feversham in Kent, *harwes* are interpreted to signifie *mansiones*. In Normans French it is called *mesuil*, or *mesuil*. *Bye* signifieth a dwelling, *bye*, an habitation, and *byan*, to dwell.

[c] 40. Aff. 38.
4. H. 6. 14.
35. E. 1. ca. 6.
Anno 1c. R. 1.
inter fines in
Thes. Ferlingus
terræ continet
32 acras.
Domesday.
Frustum. 16 E. 3.
tit. Comon. 9.
[d] Mich. 8. H. 3.
incipien. 9.
coram rege.
Warr. Ro. 6.
[e] Ving.
Eclog. 1, 2.
[f] Bract. 211.
233. 22. E. 4.
transf. 140.
Pl. Com. 168.
171. 23. H. 8.
Br. Feoffments
53. 9. Aff. p. 21.
35. H. 6. 44.
coram rege Kanes

Pl. Com. 169. (1. Sid. 309.) [g] Domesday.
in Thesaur. Statut. de extént manerii. Domesday.

[b] Pasch. 30. E. 1. coram rege Kanes

It is to be noted, that in Domesday there be often named *bordarii* seu *borduanni*, *cofces*, *cofset*, *colucami*, *cotarii*, who are all in effect bores or husbandmen, or cottagers, saving that *bordarii*, which commeth of the French word *borde* for a cottage, signifieth there bores holding a little house, with some land of husbandry bigger than a cottage; and *coterelli* are meere cottages, *qui cotagia et curtilagia tenent* (2).

Villani in Domesday (often named) are not taken there for bondmen, but had their name *de villis*, because they had fermes, and there did worke of husbandry for the lord: and they were ever named before *bordarii*, &c. and such as are bondmen are called there *servi*.

Domesday.

[i] *Coleberti*, often also named in Domesday, signifieth tenants in free socage by free rent; and so it is expounded of record. *Radmans* and *radchemistres* (*rad*, or *rede*, signifieth firme and stable), there also often named; these are *liberi tenentes qui arabant et berciebant ad curiam domini, seu falcabant, aut metebant*, because their estates are firme and stable; and they are many times called *sokemans* and *sokemanni*, because of their plough service.

[i] Int. placita
coram domino
rege Mich.
10. E. 3.
Rot. 26.
Lamb. exposit.
verb. Thanus.

Dreuchs signifieth free tenants of a mannor, there also named. *Taini*, or *thaini mediocres*, were frecholders, and sometime called *militēs regis*, and their land called *tainland*; and there it is said, *hæc terra T. R. E. fuit tainland, sed postea conversa in reveland.* [k] But *thainus regis* is taken for a baren: for it is said in an ancient author, *thainus regis proximus comiti est, et ibidem mediocris thainus, et alibi baro sive thainus* (3). *Perquarium*, or *bercaria*, commeth of *berc*, an old Saxon word, used at this day for barks or rindes of trees, and signifieth

[k] Lib. Rub.
cap. 15. & cap.
41. & 76. W. 2.
c. 46. 7. H. 4. 38.
Lib. d'Entries,
tit. Aff.
Corps Pol. 2.
(4. Inst. 294.)
Domesday.

(1) [See Note 27.]

(2) See as to cottages, 2. Inst. 736.

(3) See further as to *thane* and *thane*

land, in Reliq. Spelm. 11, &c. See also
post. 6. a. n. 6.

signifieth a tan-house, or a heath-house, where barkes or rindes of trees are laid to tan withal: and *berquarii* are mentioned in Domesday. It signifieth also, and more legally, a sheep-cote, of the French word *bergerie*.

[1] 7. H. 4. 28.
Fleta lib. 2.
cap. 35. Domes-
day. 10. R. 1.
inter fines.

[1] By *vaccaria* in law is signified a dairy house, derived of *vacca*, the cow. In Latin, it is *lactarium*, or *lactitium*; and *vaccarius* is mentioned in Domesday. And Fleta maketh mention of *porcaria*, a swinestye.

The content of an acre is known. The name is common to the English, German, and French. In legall Latin it is called *acra*, which the Latiniſts call *jugerum*. In Domesday it is called *arpen prati, silvæ*, &c. 10. R. 1. inter fines. *Acra* in Cornwall continet 40 *perticatas in longitudine*, et 4 *in latitudine*, et *qualibet perticata de 16 pedibus in longitudine* (4).

[m] 9. E. 3. 39.
Tempt E. 1.
Br. 866. Mich.
30. E. 1. coram
rege Glouc. in
Theſaur.

[m] By the grant of a ſelion of land, *ſelio terræ*, a ridge of land which containeth no certainty, for ſome be greater, and ſome be leſſer; and by the grant *de unâ porcâ*, a ridge doth paſſe. *Selio* is derived of the French word *ſellon*, for a ridge.

[n] Braſt. fo.
377. 431.
43. E. 3. 27.
Regiſt. fo. 1.
94. 248, 249.
F. N. B. fo. 87.
F. 1.
[o] Regula.

[n] By the grant *de centum libratis terræ*, or 50 *libratis terræ*, or *centum ſolidatis terræ*, &c. land of that value paſſeth, and ſo of more or leſſe; and in ancient time by that name it might have been demanded. [o] And many things may paſſe by a name, that by the ſame name cannot be demanded by a (5) *præcipe*, for that doth require more preſcript forme; but whatſoever may be demanded by a *præcipe*, may paſſe by the ſame name by way of grant.

7. R. 1. inter
fines Suſſex.

Frythe is a plaine betweene woods; and ſo is *lawnd* or *lound*. *Combe*, *hope*, *dene*, *glyn*, *hawgh*, *howgh*, ſignifyeth a vally. *Howe*, *boo*, *knol*, *law*, *pen*, and *cope*, a hill. *Ey*, *ing*, and *worth*, ſignifieth a watry place or water. *Faleſſa* is a bank or hill by the ſea-ſide; it commeth of *falaixe*, which ſignifieth the ſame. Of all theſe you ſhall read in ancient bookes, charters, deeds, and records: and to the end that our ſtudent ſhould not be diſcouraged for want of knowledge, when he meeteth with them (*neſcit enim generoſa mens ignorantiam pati*), we have armed him with the ſignification of them, to the end he may proceed in his reading with alacrity, and ſet upon, and know how to worke into with delight theſe rough mines of hidden treaſure.

[6. a.]

[m] 17. E. 3. 7.
43. E. 3. 35. b.
Regiſt. 65.
10 H. 7. 21. Pl.
Com. 191. 195.

[m] By the name of *minera*, or *fodina plumbi*, &c. the land itſelfe ſhall paſſe in a grant, if livery be made, and alſo be recovered in an aſſiſe, et ſic de ſimilibus.

Braſt. 211. 326.

[n] 45. E. 3.
Vouches 72.
33. E. 3.
grant. 102.
11. H. 6. 22. 27.
14. E. 4. 4.
20. Aſſ. p. 9.
3. E. 4. 19.
11. H. 7. 25.
(Poſt. 19. b. 2c. and 154.)

By the grant of a fouldcourſe, or the like, lands and tenements may (1) paſſe [n]. *Tenementum*, tenement, is a large word to paſſe not only lands and other inheritances which are holden, but alſo offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any franktenement, and whereof he is ſeiſed *ut de libero tenemento* (2). But *hæreditamentum*, hereditament, is the largeſt word of all in that kind; for whatſoever may be inherited is an

(4) [See Note 22.]

(5) See ante 5. a. n. 11.

(1) [See Note 23.]

(2) See further as to the extent of the word *tenement*, Perk. ſect. 114. and 11. H. 6. 22.

an hereditament, be it corporeall or incorporeall, reall or personall, or mixt (3).

[o] A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terræ*, to the end he may the better defend the land himself, having no warrantie to recover in value; for the evidences are, as it were, the finewes of the land, and the feoffor not being bound to warrantie hath no use of them. But if the feoffor be bound to warrantie, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case shall have no deeds that comprehend warrantie, whereof the feoffor may take advantage. Also, he shall have such charters as may serve him to deraigne the warrantie paramount. Also, he shall have all deeds and evidences, which are materiall for the maintenance of the title of the land; but other evidences which concerne the possession, and not the title of the land, the feoffee shall have them (4).

“*A aver et tener.*” These two words do in this place prove a double signification, *viz* *a aver*, to have an estate of inheritance of lands descendible to his heirs, and *tener*, to hold the same of some superior lord.

There have beene eight formall or orderly parts of a deed of feoffment (5), *viz*. 1. the *premisses* of the deed implied by *Littleton*; 2. the *habendum*, whereof *Littleton* here speaketh; 3. the *tenendum*, mentioned by *Littleton*; 4. the *reddendum*; 5. the *clause of warrantie*; 6. the *in cuius rei testimonium*, comprehending the sealing; 7. the date of the deed, containing the day, the month, the yeare and stile of the king, or of the yeare of our Lord; [p] lastly, the clause of *hiis testibus*; and yet all these parts were contained in very few and significant words [q], *hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt.*

[p] Vid. Throgmorton's case, Pl. Com.
Vid. Sect. 278. (2. Ro. Abr. 23.)

[q] 6. Co. 43. in *ſir Anthony Mildmay's case.*

[o] 1. Co. fo. 1.
& 2. in *Seignior Buckhurst's case.*
44. E. 3. 11. b.
39. E. 3. 17. a.
19. H. 6. 65. b.
34. H. 6. 1. a.
10. E. 4. 9. b.
18. E. 4. 14. 15.
6. H. 7. 3. b.
H. 7. 33. a.
(2. Ro. Abr. 31.)

Vide Sect. 40.
& 370, 371.
many things de
cartis et factis.
Fleta lib. 3. ca.
14. *Britton* 100,
101. *Bract.*
lib. 5. fo. 396. a. o
399.
38. H. 6. 33. 36.
Pl. Com.
Wrotesley's
case, fol. 96.
Mildmay's case.

The office of the *premisses* of the deed is twofold: first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by expresse words, or which may by reference be reduced to a certaintie; for *certum est quod certum reddi potest.* The *habendum* hath also two parts, *viz*. first, to name againe the feoffee; and secondly, to limit the certaintie of the estate. The *tenendum* at this day, where the fee simple passeth, must be of the chiefe lords of the fee. And of the *reddendum* more shall be said in his proper place, in the Chapter of Rents. Of the *clause of warrantie* more shall be said in the Chapter of Warranties. *In cuius rei testimonium sigillum meum apposui* was added, for the seale is of the essentiall part of the deed. The date of the deed many times antiquity omitted; and the

Brit. fo. 101.

(3) [See Note 24.]

(4) [See Note 25.]

(5) See the observations on this part of the Commentary in *Mad. Form. Angl. Dissert. p. 5.* See also on the subjects of

ancient deeds and charters, the whole of the same Dissertation, and *Nich. Engl. Hist. Libr.* 2d. ed. 240. *Seld. Jan. Angl. b. 2. c. 2.* and 3. to which may be added *Mabillon de Re Diplomaticâ.*

the reason thereof was, for that the limitation of prescription, or time of memory, did often in proceſſe of time change; and the law was then holden, that a deed bearing date before the limited time of preſcription, was not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of preſcription. And the date of the deedes was commonly added in the raigne of E. 2. and E. 3. and ſo ever ſince.

And ſometime antiquitie added a place, as *datum apud D.* which was in diſadvantage of the ſeoffee; for being in generall he may alleage the deed to be made where he will. And laſtly, antiquitie did add *hiis teſtibus* in the continent of the deed after the *in cujus rei teſtimonium*, written with the ſame hand that the deed was, which witneſſes were called, the deed read, and then their names entered. [r] And this is called charter land; and accordingly the Saxons called it *bockland*, as it were booke land (6): which claue of *hiis teſtibus* in ſubjects deedes continued untill and in the raigne of H. 8. but now is wholly omitted. And it appeareth by the ancient authors and authorities of the law, that before the ſtatute of 12. E. 2. c. 2. proceſſe ſhould be awarded againſt the witneſſes named in the deed, *teſtes in cartâ nominatis*; [s] and that the ſame ſtatute was but an affirmance of the common law, which not being well underſtood, hath cauſed varietie of opinions in our books. But the delay therein was ſo great, and ſometimes (though rarely) by exceptions againſt thoſe witneſſes, which being found true, they were not to be ſworne at all, neither to be joined to the jury, nor as witneſſes; [t] as if the witneſſes were infamous: for example, if he be attainted of a falſe verdict, or of a conſpiracie at the ſuite of the king, or convicted of perjury, or of a præmunire, or of forgerie upon the ſtatute of 5. Eliz. cap. 14. and not upon the ſtatute of 1. Hen. 5. cap. 3. or convicted of felony, or by judgement loſt his eares, or ſtood upon the pillory or tumbrell, or beene *ſigmaticus*, branded, or the like (1), whereby they become infamous for ſome offences, *quæ ſunt minoris culpæ ſunt majoris infamiæ*.

[6. b.]

[r] Lamb. expoſit. verb. terra ex ſcripto. Vid. Forteſc. ca. 32.

See the Second Part of the Inſtit. cap. 38. 12. E. 2. c. 2. See the Second Part of the Inſtitutes.

Marlb. cap. 6. and cap. 14.

[s] Brit. fo. 65. 101. 11. E. 3. proceſſ. 170. 6 H. 3. proceſſ. 209. 8. H. 3. proceſſ. 210. 4. E. 2. gard. 119.

[t] Mirror ca. 4. ſect. de infamies et perjurie. Glanv. lib. 2. cap. 15. Bract. lib. 5. fo. 288. 292. Brit. fo. 134. 135. 101. Fleta lib. 5. ca. 21. 8. E. 2. Aff. 396. 2. E. 3. 22. 24. E. 3. 34. (5. Co. 99. Flower's caſe) 43 E. 3. conſpir. 11. 27. Aff. 59. 33. H. 6. 55. 21. H. 6. 36. (4. Inſt. 279. 1 Sid. 51. Godb. 288. 2. Bullſtr. 154. Raym. 369. 1. Ventr. 349. 1. Keijnge 38. 18. 4. Inſt. 279. T. Jo. 155. 2. Ro. Abr. 686.)

[a] Forteſc. ca. 26. Pat. 55. II. 3 m. 3. Stanf. Pl. Cor. 174. a.

[b] Forteſc. ca. 25.

[c] 22. Aff. 12. and 41. 23. Aff. 11. 19. E. 2. 116. Aff. 409.

[a] If a champion in a writ of right become recreant or coward, he thereby loſeth *liberam legem*, and thereby becomes infamous, and cannot be a witneſſe; for regularly he that loſeth *liberam legem*, becometh infamous, and can be no witneſſe. Or if the witneſſe be an infidell (2), or of non-ſane memory, or not of diſcretion, or a partie intereſted, or the like. [b] But oftentimes a man may be challenged to be of a jury, that cannot be challenged to be a witneſſe; and therefore though the witneſſe be of the neereſt alliance, or kindred, or of counſell, or tenant, or ſervant to either partie, or any other exception that maketh him not infamous, or to want underſtanding, or diſcretion, or a partie in intereſt, though it be proved true, ſhall not exclude the witneſſe to be ſworne [c], but he ſhall be ſworne, and his credit upon the exceptions taken againſt him left to thoſe of the jury, who are tryers of the fact; inſomuch as ſome bookeſ have ſaid, that though the witneſſe named

in

(6) [See Note 26.]

(2) [See Note 28.]

(1) [See Note 27.]

in the deed be named a disseisor in the writ, yet he shall be sworn as a witness to the deed. [d] A witness amongst others named in a deed was outlawed, and no process was awarded against him by the statute, because he was *extra legem*; and an outlawed person cannot be an auditor. And the court in some bookes have said, that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid; but such as are returned to be of a jury are to be challenged for the causes aforesaid for outlawry, and divers other causes (for the which a witness cannot be challenged), and such process against witnesses (3) is vanished. But seeing the witnesses named in a deed shall be joyned to the inquest, and shall in some sort joyne also in the verdict (in which case if jury and witnesses finde the deed that is denied to be the deede of the partie, the adverse partie is debarred of his attain, because there is no more than 12 that affirme the verdict) (4), it is reason, that in that case of joyning such exception shall be taken against the witness as against one of the jury, because he is in the nature of a juror. [e] And therefore to put one example, if he be outlawed in a personall action, he cannot be joined to the jury; but yet that is no exception against him to exclude him to be sworn as a witness to the jury. And the reason of all this is, for that if he with others should joyne in verdict with the jury in affirmance of the deed, the partie should be barred of his attain. But note, there must be more than one witness that shall be joined to the inquest. And albeit they joyne with the jury, and finde it not his deed, notwithstanding this joyning, the partie shall have his attain; for it is a maxim in law, [f] that witnesses cannot testifie a negative (5), but an affirmative. And if one of the witnesses named in the deed be one of the panell, he shall be put out of the panell; and all these secrets of law notably appeare in our bookes.

To shut up this point, it is to be knowen, [g] that when a triall is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of 12 men, there the judgement is not given upon witnesses, or other kinde of evidence, but upon the verdict: and upon such evidence as is given to the jury, they give their verdict. And Bracton saith, there is *probatio duplex*, viz. *viva*, as by witnesses *viva voce*; and *mortua*, as by deedes, writings, and instruments. And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz. violent, probable, and light or temerary. *Violenta præsumptio* is manie times *plena probatio*; as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house. *Præsumptio probabilis* moveth little; but *præsumptio lævis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment,

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the process for that purpose, 33. H. 6. 19. and in Vin. Abr. *Evidence* H. a. and J. a.

(4) Acc. 1. Ro. Abr. 280. pl. 14. and

2. Inst. 662. See infra, n. 5.

(5) Acc. 4. Inst. 279. and the references supra in n. 4. But see 1. Ro. Rep. 83. Com. 18. 57. Gilb. Law. of Evid. 157. Law of Nisi Prius, 1st ed. 422.

[d] 34. E. 1. process. 208.

[e] 34. E. 1. tit. Process. 208. 11. Aff. p. 19, 20. 12. Aff. p. 1. 12. 41.

18. Aff. p. 11.

22. Aff. 15.

23. Aff. 15.

40. Aff. 23.

48. Aff. p. 5.

21. H. 6. 30.

[f] 48. E. 3. 30.

12. H. 6.

fo. 6. a.

50. E. 3. 16.

43. E. 3. 32.

12. H. 4. 9.

19. E. 2.

Aff. 408. Pasch.

14. E. 3. coram

rege Devon.

in thesaur.

Fleta lib. 6.

cap. 6. F. N. B.

106. h. and

97. c.

(Post. 303.)

[g] Mirror ca.

3. Pl. Com.

fo. 10.

Bract. lib. 5.

fo. 400.

(Post. 373. a.)

Fleta lib. 6.

ca. 33.

8. E. 3. 290.

39. E. 3. 21. b.

Glanvil. lib. 10.
ca. 12.
Fleta lib. 6.
ca. 33.

feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proove, is continuall and quiet possession; for *ex-diatu-ritate temporis omnia præsumuntur solenniter esse acta*. Also the deed may receive credit *per collationem sigillorum scripturæ*, &c. *et super fidem cartarum mortuis testibus erit ad patriam de necessitate recurrendum*.

[b] Pasch. 10.
Ja. in Com.
Banco upon the
stat. of bank-
routs,
(1. Brownl. 47.
2. Ro. Abr. 585.
Hutt. 115.
Raym. 1.
1. Ventr. 243.
3. Keb. 193.
1. Sid. 431.)

[i] Fleta lib. 2.
ca. 44. 13. E. 1.
tit. Vill. 36, 37.
19. E. 2. ibid. 32.
(Post. 25.)

[k] Tr. 8. Ja. in
Com. Banco.
Smithe's case,
in evidence upon

an information upon the statute of usury. Brit. fo. 134. (Raym. 191. 7. Mod. 118.)
(1. Sid. 51. 2. Ro. Abr. 685.)

(3. Inst. 77.)

Note, it hath been resolved by the justices, that a wife [b] cannot be produced either against or for her husband (6), *quia sunt duæ animæ in carne unâ*; and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; but [i] in some cases women are by law wholly excluded to beare testimony; as to prove a man to be a villeine, *mulieres ad probationem statûs hominis admitti non debent*. It was also agreed by the whole court [k], that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be *testis in propriâ causâ*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet *in rei veritate* he is the partie (7). And herewith in effect agreeth Britton, that he that challengeth a right in the thing in demand, cannot be a witness, for that he is a party in interest (1). But now let us returne to that from the which by way of digression (upon this occasion) we are fallen.

[7. a.]

And the ancient charters of the king, which passed away any franchise or revenue of any estate of inheritance, had ever this clause of *hiis testibus*, of the greatest men of the kingdome, as the charters of creation of nobility yet have at this day. When *hiis testibus* was omitted, and when *teste me ipso* came into the king's grants, you shall reade in the Second Part of the Institutes (2), *Magna Charta*, cap. 28. I have tearmed the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without *premisses*, *habendum*, *tenendum*, *reddendum*, clause of *warrantie*, the clause of *in cuius rei testimonium*, the *date*, and the clause of *hiis testibus*, yet the deed is good. [f] For if a man by deede give lands to another and to his heires without more saying, this is good, if he put his seale to the deede, deliver it, and make livery accordingly. [g] So it is if *A.* give lands to have and to hold to *B.* and his heires, this is good, albeit the feoffee is not named in the (3) premisses. And yet no well advised man will trust to such deeds, which the law by construction maketh good, *ut res magis valeat*; but when forme and substance concur, then is the deed faire and absolutely good. The sealing of charters and deeds is much more ancient than some

out

[g] Vid. Tearmes of the Law, verb. Faits. Vid. Glanvil. lib. 10. c. 12. Mirr. c. 1. sect. 3. and c. 3.
(2. Ro. Abr. 66. pl. 13. Cro. Eliz. 903.)

(6) [See Note 29.]

(2) [See Note 32.]

(7) [See Note 30.]

(3) [See Note 33.]

(1) [See Note 31.]

cut of error have imagined (4); for the charter of king Edwyn, brother of king Edgar, bearing date *anno Domini* 956, made of the lard called *Jecklea*, in the isle of Ely, was not only sealed with his owne seale (which appeareth by these words, *ego Edwinus gratiâ Dei totius Britannicæ telluris rex meum donum proprio sigillo confirmavi*), but also the bishop of Winchester put to his seale, *ego Ælfwinus, Winton. ecclesiæ divinus speculator, proprium sigillum impressi*. And the charter of king Offa, whereby he gave the Peter-pence, doth yet remaine under seale. But no king of England before or since the Conquest sealed with any seale of armes before king R. 1. but the seale was the king sitting in a chaire on the one side of the seale, and on horsbacke on the other side in divers formes. And king R. 1. sealed with a seale of two lyons, for the Conqueror of England bare two lyons; and king John in the right of Aquitaine (the duke whereof bare one lyon) was the first that bare three lyons, and made his seale accordingly, and all the kings since have followed him. And king E. 3. in *anno* 13. of his raigne, did quarter the armes of France with his three lyons, and tooke upon him the title of king of France, and all his successors have followed him therein.

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses either of delivery of the deed, or of livery of seisin, by expresse tearmes was but of later times, and the reason was in respect of the notoriety of the feoffment. And I have knowne some ancient deeds of feoffment having livery of seisin indorsed suspected, and after detected of forgerie. As if a deed in the stile of the king name him *defensor fidei* before 13. H. 8. or *supreme head* before 20. H. 8. at which time he was first acknowledged supreme head by the cleargy, albeit the king used not the stile of *supreme head* in his charters, &c. till 22. H. 8. or *king of Ireland* before 33. H. 8. at which time he assumed the title of *king of Ireland* (5), being before that called lord of Ireland, it is certainly forged; *et sic de similibus*. 21. H. 8. cap. 16.

And some have observed that *grace* was attributed to king H. 4. *excellent grace* to king H. 6. *majestie* to king H. 8. and before, the king was called *soveraigne lord, liege lord, highness, and kingly highnesse*, which in Latin in legall proceedings is called *regia celsitudo*; as the beginning of the petition of right to the king is *humillimè supplicavit vestræ celsitudini regiæ, &c.* and the like. And upon this occasion it shall not be impertinent, seeing it is part of the formall deed, to set downe the severall stiles of the kings of England since the Conquest. Vid. 2. H. 4. c. 15. where royall majesty is attributed to the king, and crimen læsæ majestatis farre more ancient.

William the Conqueror commonly stiled himselfe *Willielmus rex*, and sometimes *Willielmus rex Anglorum*. And the like did William Rufus, and sometimes *Willielmus Dei gratiâ rex Anglorum*.

Henry the first, *Henricus rex Anglorum*, and sometimes *Henricus Dei gratiâ rex Anglorum*.

Mawde,

(4) See further as to the antiquity of sealing deeds, in Seld. Jan. Angl. b. 2. c. 2. Mad. Form. Anglic. Dissert. p. 27.

and Nichols. Engl. Histor. Libr. 2d. ed. 241.

(5) See Post. 7. b. v. 1.

Mawde, the sole daughter and heire of H. 1. wrote *Matildis imperatrix Henrici regis filia et Anglorum domina*; divers of whose creations and grants I have seene.

King Stephen used the stile that king H. 1. did.

Henry the 2. *Fitz-Empress* omitted *Dei gratiâ*, and used this stile, *Henricus rex Angliæ, dux Normanniæ et Aquitaniæ, et comes Andegaviæ*, he having the duchy of Aquitaine and earledome of Poitiers in the right of Elianor his wife heire to both, and the earldome of Anjowe Tournie and Maine, as sonne and heire to Jeffery Plantagenet by the said Mawde his wife, daughter and sole heire of king H. 1. She was first married to Henry the emperor, and after his death to the said Jeffery Plantagenet. Which duchie of Aquitaine doth include Gascoigne and Guien.

King R. 1. used the stile that H. 2. his father did; yet was he king of Cyprus, and after of Jerusalem, but never used either of them.

King John used that stile, but with this addition, *dominus Hiberniæ*; and yet all that he had in Ireland was conquered by his father king H. 2. which title of *dominus Hiberniæ* he assumed as annexed to the crowne, albeit his father, in the 23. yeare of his raigne, had created him king of Ireland in his lifetime (1).

[7. b.]

King H. 3. stiled himselfe as his father king John did, untill the 44. yeare of his raigne, and then he left out of his stile, *dux Normanniæ, et comes Andegaviæ*, and wrote onely *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*.

King E. 1. stiled himselfe in like manner as king H. 3. his father did, *rex Angliæ dominus Hiberniæ, et dux Aquitaniæ*. And so did king E. 2. during all his raigne. And king E. 3. used the selfe same stile untill the 13. yeare of his raigne, and then he stiled himselfe in this forme, *Edwardus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ*, leaving out of his stile *dux Aquitaniæ*. He was king of France as sonne and heire of Isabel wife of king E. 2. daughter and heire of Philip le Beau king of France. He first quartered the French armories with the English in his great seale, *anno domini 1338. et regni sui 14.*

King R. 2. and king H. 4. used the same stile that king E. 3. did. And king H. 5. untill the 8. yeare of his raigne continued the same stile, and then wrote himselfe *rex Angliæ, hæres et regens Franciæ, et dominus Hiberniæ*, and so continued during his life.

King H. 6. wrote *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ*. This king being crowned in Paris king of France used the said stile 39. yeares, till he was dispossessed of the crowne by king E. 4. who after he had reigned also about ten yeares, king H. 6. was restored to the crowne againe, and then wrote, *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ, ab inchoatione regni sui 49. et recaptionis regiæ potestatis primo.*

King E. 4. R. 3. and H. 7. stiled themselves, *rex Angliæ et Franciæ, et dominus Hiberniæ*.

King H. 8. used the same stile till the tenth yeare of his raigne, and then he added this word (*octavus*), as *Henricus octavus Dei gratiâ, &c.* In the 13. yeare of his raigne he added to his stile

fidei

Vid. Rot.
Parliam. anno
1. H. 6. nu. 15.
he was stiled rex
Franciæ et
Angliæ, et
dominus
Hiberniæ.

(1) See further as to the deduction and change of the king's title in respect to Ireland, in Seld. Tit. Hon. b. 1. c. 4. l. 2.

fidei defensor (2). In the 22. yeare of his raigne, in the end of his stile he added, *supremum caput Ecclesiæ Anglicanæ* (3). And in the 23. yeare of his raigne he stiled himselfe thus, *Henricus octavus, Dei gratiâ Angliæ Franciæ et Hiberniæ rex, fidei defensor, &c. et in terrâ ecclesiæ Anglicanæ et Hiberniæ supremum caput* (4).

King E. 6. used the same stile, and so did queene Mary in the beginning of her raigne, and by that name summoned her first parliament, but soone after omitted *supremum caput*. And after her marriage with king Philip, the stile notwithstanding that omission was the longest that ever was, *viz. Philip and Mary, by the grace of God, king and queene of England and France, Naples, Jerusalem, and* (5) *Ireland, defenders of the faith, princes of Spaine and Cicilie, arch-dukes of Austria, dukes of Millaine Burgundy and Brabant, countees of Hasburgh Flanders and Tyroll*. And this stile continued till the fourth and fifth yeare of king Philip and queene Mary, and then Naples was put out, and in place thereof both the Cicilies put in, and so it continued all the life of queene Mary.

I need not mention the stile of queene Elizabeth, king James, nor of our soveraigne lord king Charles, because they are so well knowne; and I feare I have beene too long concerning this point, which certainly is not unnecessary to be knowne for many respects. But to shew the causes and reasons of these alterations would aske a treatise of it selfe (6), and doth not sort to the end that I have aimed at. And now let us returne to the learning of charters and deeds of feoffments and grants.

Very necessary it is that witnesses should be underwritten or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their owne hands. For livery of seisin see hereafter, Sect. 59. and for deeds, Sect. 66. and of conditionall deeds see our author in his Chapter of Conditions. And now let us proceed to the other words of our author.

Livery of seisin incident to a feoffment. Vid. Sect. 59.

“*A luy et a ses heires.*” *Hæres*, in the legall understanding of the common law, implyeth, that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood, do descend of some estate of inheritance. For *solus Deus hæredem facere potest, non homo: dicuntur autem hæreditas et hæres ab hærendo, quòd est arctè insidendo, nam qui hæres est hæret; vel dicitur ab hærendo, quia hæreditas sibi hæret, licèt nonnulli hæredem dictum velint, quòd hæres fuit, hoc est dominus terrarum, &c. quæ ad eum perveniunt.*

Mirr. cap. 2. sect. 15. Bract. lib. 2. fol. 62. b. Flet. lib. 6. cap. 1. & 54. & lib. 1. cap. 13. Glanvil. lib. 7. ca. 1. & ca. 12. & 13. (Post. 237. b.)

A monster, which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage; [a] but although he hath deformity in any part of his body, yet if he hath human shape he may be heire. *Hii qui contra formam humani generis converso more procreantur, ut si mulier monstrosam vel prodigiosum enixa, inter liberos non computentur. Partus tamen cui*

[a] Bract. lib. 5. fol. 437, 438. Brit. ca. 66. fol. 167. & ca. 83. Fleta lib. 1. ca. 5. (Post. 29. b.)

(2) [See Note 34.]

(3) See Burn. Hist. Reform. v. i. p. 136.

(4) See the 35. H. 8. c. 3. which ratifies the king's stile.

(5) [See Note 35.]

(6) See further concerning the stiles of the

kings of England, and also of Great-Britain, since the union of the two kingdoms, in Nicholl. Eng. Histor. Libr. 2d ed. p. 248. and the several Treatises which have been published on the English Coins.

natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari. Si inutilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus monstrosus. Another faith, *ampliatio seu diminutio membrorum non nocet.* [b] A bastard cannot be heire, for (as hath beene said before) *qui ex damnato coitu nascuntur inter liberos non computentur.* Every heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile. *Hermaphrodita, tam masculo quam fœminæ comparatur, secundum prævalascentiam sexûs incalescentis.* And accordingly it ought to be baptized. See more of this matter Sect. 35.

[b] Vid. Sect. 188. 309. Bract. lib. 2. fo. 92. Brit. fo. Fleta lib. 1. ca. 5. & 1. 6. c. 8. Fleta ubi supra. 3. R. 2. entr. cong. 38. (1. Ro. Abr. 625.)

[c] Mirror ca. 1. ca. 3. sect. ca. 5. sect. Bract. lib. 5. fo. 415. 427. Brit. fo. 29. Fleta lib. 6. ca. 47. 13. E. 3. Br. 677. 25. E. 3. de natis ultra mare. 31. E. 3. Cousinage 5. 42. E. 3. 2. 11. H. 4. 26. 14. H. 4. 19, 20. 3. H. 6. 55. 22. H. 6. 38. 9. H. 4. 7. 7. Co. 1. in Calvin's case. (Cro. Jam. 539. Godb. 275. 1. Sid. 195. 201. Noy 158. T. Jo. 10. Vaugh. 274. 2. Sid. 23. Hardr. 224. 2. Ventr. 1) 1. Ed. 3. 4. 6. Ed. 3. 55. 27. E. 3. 77. 3. E. 2. descent. Br. 64. 31. E. 1. descent. 17. 46. E. 3. Petition 20. 26. Aff. p. 2. 49. Aff. pl. 4. 29. Aff. pl. 11. 9. H. 5. 9.

[c] A man seised of lands in fee hath issue an alien that is borne out of the king's ligeance; he cannot be heire, *propter defectum subjectionis* (1), albeit he be borne within lawfull marriage. If made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwise it is, if he be naturalized by act of parliament; for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the issue that he hath afterwards shall be heire to him, but no issue that he had before. If an alien cometh into England, and hath issue two sonnes, these two sonnes are *indigenæ*, subjects borne, because they are borne within the realme. And yet if one of them purchase lands in fee, and dyeth without issue, his brother shall not be his heire (2); for there was never any inheritable blood betweene the father and them; and where the sonnes by no possibility can be heire to the father, the one of them shall not be heire to the other. See more at large of this matter Sect. 198.

If a man be attainted of treason or felony, although he be borne within wedlocke, he can be heire to no man, nor any man heire to him, *propter delictum*, for that by his attainder his blood is corrupted. And this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament; for albeit the person attainted obtaine his charter of pardon, yet that doth not make any to be heire whose blood was corrupted at the time of the attainder, either downward or upward. [d] As if a man hath issue a sonne before his attainder, and obtaineth his pardon, and after the pardon hath issue another sonne, at the time of the attainder the blood of the eldest was corrupted, and therefore he cannot be heire. But if he die living his father, the younger sonne shall be heire; for he was not *in esse* at the time of the attainder, and the pardon restored the blood as to all issues begotten afterwards. But in that case if the eldest sonne had survived the father, the younger sonne cannot be heire; because he hath an elder brother which by possibilitie might have inherited: but if the elder brother had been an alien, the younger sonne should be heire, for that the alien never had any inheritable

[d] Stanf. pl. cor. 195, 196. Bract. lib. 3. fo. 132, 133. 276. & lib. 5. fo. 374. Britton fo. 215 b. Fleta lib. 1. ca. 28. (Noy 170. Finch 8vo. ed. 207. Ante 2. b. Post. 129. Cro. Cha. 543. 1. Sid. 195. 202. 1. Ro. Abr. 625. Cro. Jam. 539)

(1) [See Note 36.]

(2) [See Note 37.]

heritable blood in him (3). See more plentifully of this matter Sect. 746, 747.

If a man hath issue two sonnes, and after is attainted of treason or felony, and one of the sonnes purchase land and dieth without issue, the other brother shall be his heire; for the attainder of the father corrupteth the lineall blood onely, and not the collaterall blood between the brethren, which was vested in them before the attainder, and each of them by possibility might have been heire to the father; and so hath it been adjudged (4). * But otherwise in the case of the alien-née, as hath been said. [e] But some have holden, that if a man after he be attainted of treason or felony have issue two sonnes, that the one of them cannot be heire to the other, because they could not be heir to the father, for that they never had any inheritable blood in them (5).

[f] One that is borne deafe and dumbe may be heire to another, albeit it was otherwise holden in ancient time. And so if borne deafe dumbe and blinde, for *in hoc casu vitio porcitur naturali*. But contract they cannot. Ideots, leapers, madmen, outlawes in debt trespasses or the like, persons excommunicated, men attainted in a *præmunire*, or convicted of heresie, may be heires.

18. E. 3. 53. 13. E. 3. Ley 49. (1. Ro. Abr. 626.)

[g] If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months (6) hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose (7) his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniences, this was the law before the Conquest, *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem* (8).

541. 3. S. C. Godb. 281.)

[h] A man by the common law cannot be heire to goods or chattels, for *hæres dicitur ab hæreditate*. [i] If a man buy divers fishes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall goe with the (9) inheritance; because they were at libertie, and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunk or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house, ~~young and old, shall goe to the~~ (10) heire. [k] But of ancient time the heire was permitted to have an action of debt upon a bond made to his auncestor and his

* In the Exchequer Mic. 40. & 41. Eliz. in le case de Hobby.
[e] Braçt. lib. 3. fol. 130. Brit. fol. 15. Fleta lib. 1. cap. 58. (1. Sid. 193. 1. Lev. 60. Vaugh. 274. 1. Ventr. 414.)
[f] Braçt. lib. 5. fo. 421. 430. 434. lib. 2. fo. 12. Fleta lib. 6. ca. 39. 47. 14. H. 3. bre. 877. 32. E. 3. Age 8. 10. E. 3. 535. (1. Ro. Abr. 626.)

[g] 21. E. 3. 39. Pancirollus nova rep. 485, &c. Opus eximium 48. b. Lambard de priscis Anglorum legibus, 120. 72. acc. (1. Ro. Abr. 357. Cro. Jam. C. Godb. 281.)

[h] Braçt. lib. 4. ca. 9. fo. 265. lib. 2. fo. 62. b. Fleta lib. 6. ca. 1. 8. Co. 54. Sym's case.

[i] Mich. 36. & 37. El. Rot. 25. inter Gray and Paulet in the king's bench. Stanford 25. b. 18. E. 4. 8. 22. Aff. 25.

18. H. 8. 2. [k] 13. E. 3. det. 135. 139. 140. 47. E. 3. 23. 25. E. 3. fo. 48. 26. E. 3. fo. Vid. for an heirelome hæreditarium or principalis, Sect. 12.

(3) Besides the authorities in the margin, see W. Jo. 34.

(4) S. p. acc. Noy 158. 4. Leon. 5.

(5) [See Note 38.]

(6) See post. 123. b. where this is said to be the utmost time the law supposes a woman

to go with child, and the authorities which the reader will find there cited on the subject.

(7) [See Note 39.]

(8) [See Note 40.]

(9) Acc. Cro. Eliz. 372.

(10) [See Note 41.]

his heires; but the law is not so holden at this day. *Vid.* Sect. 12.

[7] Mirror ca. 1.
sect. 3.

[7] It is to be noted, that one cannot be heire till after the death of his auncestor. Before he is called *hæres apparens*, heire apparent.

[a] Bract. lib. 2.
fo. 85. Heref.
p. 8. E. 1. Ro.
So. de Banco.
Mirror cap. 2.
sect. 18. Britton
151. b.
[b] Registr. fo.
227. Bracton
lib. 2. fo. 69.
Britton fo. 165.
Fleta lib. 1.
ca. 14.
(Cro. Eliz. 566.
Cro. Jam. 685.)

In our old bookes and records there is mention made of another heire, *viz. hæres astrarius*, so called of *astre*, that is, an harth of a house; because the auncestor by conveyance hath set his heire apparent, and his family, in a house and living in his life-time, of whom Bracton saith thus, [a] *Item isto quod hæres sit astrarius, vel quod aliquis antecessor restituat hæredi in vitâ suâ hæreditatem, et se dimiserit, videtur quod nullo tempore jacebit hæreditas, et ideo quod nec relevari possit, nec debeat, nec relevium dari.* [b] For the benefit and safety of right heires *contra partus suppositos*, the law hath provided remedie by the writ *de ventre inspiciendo*, whereof the rule in the Register is this: *Nota, si quis habens hæreditatem duxerit aliquam in uxorem, et postea moriatur ille sine hærede de corpore suo exeunte, per quod hæreditas illa fratri ipsius defuncti descendere debeat, et uxor dicit se esse prægnantem de ipso defuncto cum non sit, habeat frater et hæres breve de ventre inspiciendo.* It seemeth by Bracton, and Fleta which followed him, that this writ doth lie, *ubi uxor alicujus in vitâ viri sui se prægnantem fecit cum non sit, vel post mortem viri sui se prægnantem fecit cum non sit, ad exhæredationem veri hæredis, &c. ad querelam veri hæredis per præceptum domini regis, &c.* which is to be understood according to the rule of the Register. When a man having lands in fee simple dieth, and his wife soon after marrieth againe, and faines herself with childe by her former husband, in this case though she be married, the writ *de ventre inspiciendo* doth lie (1) for the heire. But if a man seised of lands in fee (for example) hath issue a daughter, who is heire apparent, she in the life of her father cannot have this writ for divers causes. First, because she is not heire, but heire apparent; for, as hath been said, *nemo est hæres viventis*; and this writ is given to the heire to whom the land is descended. And both Bracton and Fleta say, that this writ lyeth *ad querelam veri hæredis*, which cannot be in the life of his auncestor; and herewith agreeth Britton and the Register. Secondly, the taking of a husband in the case afore said being her owne act, cannot barre the heire of his lawfull action once vested in him (2). Thirdly, the law doth not give the heire apparent any writ, for it is not certaine whether he shall be heire, *solus Deus facit hæredes*. Fourthly, the inconvenience were too great, if heires apparent in the life of their auncestor should have such a writ to examine and trie a man's lawfull wife in such sort as the writ *de ventre inspiciendo* doth appoint; and if she should be found to be with childe, or suspect, then she must be removed to a castle, and there safely kept untill her delivery, and so any man's wife might be taken from him against the lawes of God and man.

Britton fo. 165.
b. Registr. ubi
supra.

Vid. Bracton,
Britton and Fleta
ubi supra.
Registr. ubi
supra. Bracton
and Fleta ubi
supra have (ad
exhæredatio-
nem.)

The words of the writ *de ventre inspiciendo* make this evident. *Rex vic. salutem. Monstravit nobis A. quod cum R. quæ fuit uxor Clementis B. prægnans non sit, ipsa falso dicit se esse prægnantem de eodem Clemente, ad exhæredationem ipsius A. desicut terra quæ fuit ejusdem C. ad ipsum A. jure hæditario descendere debeat tanquam ad fratrem et hæredem ipsius se se prædict. R. prolem de eo non habuerit,*

[8. b.]

(1) [See Note 42.]

(2) [See Note 43.]

habuerit, &c. But this rather belongs to the treatise of originall writs, and therefore thus much herein shall suffice (3).

And it is to be observed, that every word of Littleton is worthy of observation. (1) First (Heires) in the plurall number; for if a man give land to a man and to his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take (4) nothing. (2) Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him or his heires, he hath but an (5) estate for life, for the uncertainty (*ses, suis*). (3) If a man give land unto two, To have and to hold to them two *et hæredibus* [c], omitting *suis* (6), they have but an estate for life, for the uncertainty; whereof more hereafter in this Section. But it is said, if land be given to one man *et hæredibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton.

[d] "*Et ses assignes.*" Assignee cometh of the verb *assigno*. And note there be assignes in deed, and assignes in law; whereof see more in the Chapter of Warrantie, Sect. 733.

"*Ceux parolx (ses heires) tantselement font l'estate d'enheritance en tous feoffments et grants.*" [e] *Si autem facta esset donatio, ut si dicam, do tibi talem terram, ista donatio non extendit ad hæredes sed ad vitam donatori, &c.* [f] Here Littleton treateth of purchases by naturall persons, and not of bodies politique or corporate; [g] for if lands be given to a sole body politique or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politique or corporate capacitie, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance (7); for as the heire doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. [h] But it appeareth here by Littleton, that if a man at this day give lands to *I. S.* and his successors, this createth no fee simple in him; for Littleton speaking of naturall persons saith that these words (his heires) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors). [i] And yet if it be an ancient grant, it must be expounded as the law was taken at the time of the grant. [k] A chantry priest incorporate tooke a lease to him and his successors for a hundred yeares, and after tooke a release from the lessor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease in his naturall capacity, for it could not go in succession (1), and (his successors) gave him no estate

[c] 10. H. 6. 7.
22. H. 6. 15.
Pl. Com. 28. b.
22. E. 4. 16.
2. H. 4. 13.
20. E. 3. bre. 377.

[d] 5. Co. 96, 97.
Brit. fo. 28.
H. 8. Dyer. Pl.
Com. 287, 288.
(Post. 22. a.
5. Co. 112.)

[e] Braet. lib. 2.
cap. 39. fo. 92. b.
Br. ca. 39. fo. 99.
b. Fleta lib. 6.
ca. 1, 2. &
lib. 3. cap. 2.
20. H. 6. 35, 36.
19. H. 6. 17. 22.
74. 22. E. 4.
16. b. 4. E. 6.
Pl. Com. 26.

[f] Vid. Sect.
413.

[g] 7. E. 3. 25.
Vid. Sect. 686.
25. E. 3. 35.
Braet. lib. 2.
fo. 62. b.
Vid. Sect. 413.
(5. Co. 112.
1. Leon 2.)

[h] Pl. Com.
242. Seignior
Berkley's case.

[i] Vid. Brit.
fo. 86. 121. &
130.

17. E. 3. 25. b.
14. H. 6. 12.
Tr. 5. E. 3. Rot. 4. in Scaccario.
3. E. 3. 32. 7. E. 3. 40. 11. H. 4. 84. 12. H. 4. 12. 18. E. 3. Conusans 39. b. 5. E. 4. 121.
38. E. 3. 4. Co. 9. 28. in Casede Abb. de Strata Marcella. [k] Hil. 21. Eliz. Dyer's manu-

script, inter Anley and Johnson in Com. Banco. (4. Co. 65.)

(3) [See Note 44.]

(4) [See Note 45.]

(5) See 5. Co. 112. post. 214. & Plowd. 286. 289. in which last book it is particularly considered, where the *disjunctive* shall

be construed as the *conjunctive*.

(6) See 2. Ro. Abr. 833. M. & Vin. Abr. Estate, M.

(7) [See Note 46.]

(1) [See Note 47.]

[1] 18. H. 6. 11. estate of inheritance for want of these words (his heires). [1] If the king by his letters patent giveth lands *decano et capitulo, habendum sibi et hæredibus et successoribus suis*; in this case, albeit they be persons in their naturall capacity to them and their heires, yet because the grant is made to them in their politique capacity, it shall enure to them and their successors. And so if the king do grant lands to *I. S. habendum sibi et successoribus sive hæredibus suis*, this grant shall enure to him and his heires.

[m] 15. E. 3. tit. Counterplea de Voucher 43. 37. H. 6. 30. 11. E. 4. 2. (Cro. Jam. 374. 6. Co. 16. b. 1. Leon. 287.) [m] B. having divers sonnes and daughters, A. giveth lands to B. et liberis suis, et a leur heires, the father and all his children do take a fee simple jointly by force of these words (their heires); (2) but if he had no childe at the time of the feoffment, the childe borne afterward shall not take (3).

These words (his heires) doe not onely extend to his immediate heires, but to his heires remote and most remote, borne and to be borne, [n] *sub quibus vocabulis (hæredibus suis) omnes hæredes propinqui comprehenduntur, et remoti, nati, et nascituri*. And *hæredum appellatione veniunt hæredes hæredum in infinitum*. And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.

There be many words so appropriated, as that they cannot be legally expressed by any other word, or by any periphrasis or circumlocution. Some to estates of lands, &c. as here and in [a] other places of our author. In this place these words *tantselement*, not *selement*, alone, but *tantselement*, all onely, i. e. *solummodo* or *duntaxat*, are to be observed. [b] Some to tenures; [c] some to persons; [d] some to offences; [e] some to forms of original writs, either for recovery of right, or removing, or redresse of wrong; [f] some to warrantie of land. These have I touched for examples. I leave others to the studious reader to observe, and add, holding this for an undoubted verity, that there is no knowledge, case, or point in law, seeme it of never so little account, but will stand our student in stead at one time or other, and therefore in reading, nothing to be pretermitted.

[a] Sect. 17. 62. 133. [b] Sect. 156. 161. [c] Sect. 184. [d] Sect. 190. 194. 746. [e] Sect. 9. 67. 194. 204. 234. 236. 241. 405. 485. 478. 651. 655. 646. 620. 614. 637. 674. 692. [f] Sect. 733. "Font l'estate." *Status dicitur à stando*, because it is fixed and permanent. The Isle of Man, which is no part of the kingdom, but a distinct territory of itselfe, hath beene granted by the great seale to divers subjects and their heires. [g] It was resolved by the lord chancellor, the two chiefe justices and chiefe baron, that the same is an estate descendible according to the course of the common law; for whatsoever state of inheritance passe under the great seale of England, it shall be descendible according to the rules and course of the common law of England (4).

[g] Tr. 40. Eli. in le Count de Derby's case, by the Lo. Chancellor, les 2 chiefe Justices, & chiefe Baron.

"En tous feoffments et grants." Here it giveth the feoffment the first place, as the ancient and the most necessary conveyance, both for that it is solemne and publike, and therefore best remembered and proved,

(2) [See Note 48.]

(3) [See Note 49.]

(4) S. C. 4. Init. 284. and 2. And. 115.

See further concerning the Isle of Mann in Pryn. on 4. Inst. 201. 384. Hale's Hist.

Com. L. 183. Palm. 344. 1. P. Wms. 329. 1. Vef. 202. 2. Vef. 337. 1. Blackst. Comment. 5th Ed. p. 104. and Camp. Polit. Surv. of Brit. v. 1. p. 524.

proved, [*] and also for that it cleareth all disseisins, abatements, intrusions, and other wrongfull or defeasible estates, where the entry of the feoffor is lawfull, which neither fine, recovery, nor bargain and sale by deede indented and inrolled doth. And here is implied a division of fee, or inheritance, viz. [b] into corporeall, as lands and tenements which lie in livery, comprehended in this word feoffment, and may passe by livery by deed, or without deed, which of some is called *hereditas corporata*, and incorporeall, (which lie in grant, and cannot passe by livery, but by deede, as advowsons, commons, &c. and of some is called *hereditas incorporata*, and, by the delivery of the deede, the freehold, and inheritance of such inheritance, as doth lie in grant, doth passe) comprehended in this word Grant. And the deed of incorporate inheritances doth equall the livery of corporeate. And therefore Littleton saith, in all feoffments and grants, *hereditas, alia corporalis, alia incorporalis: corporalis est, quæ tangi potest et videri; incorporalis, quæ tangi non potest, nec videri.*

Feoffment is derived of the word of art *feodum, quia est donatio feodi*; for the antient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment (5). And that word Ephron used*, when he enfeoffed Abraham, saying, I give thee the field of Machpelah over against Mamre, and the cave therein I give thee, and all the trees in the field and the borders round about; all which were made sure unto Abraham for a possession, in the presence of many witnesses.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveyance in fee, as our author himselfe hereafter saith, † in his Chapter of Tenant for Life. And yet sometime improperly it is called a feoffment when an estate of freehold onely doth passe: *done est nosme generall plus que n'est feoffment, car done est generall a tous choses moebles et nient moebles, feoffment est riens forsque del soyle.* And note, there is a difference *inter cartam et factum*; for *carta* is intended a charter which doth touch inheritance, and so is not *factum*, unless it hath some other additions (1).

Grant, concessio, is properly of things incorporeall, which (as hath been said) cannot passe without deed. And here it is to be observed, (that I may speak once for all) that every period of our author in all his three books containes matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heires*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implyeth, that this rule extendeth not,

First, to *last wills and testaments*; for thereby, [i] as he himselfe after saith, an estate of inheritance may passe without these words (*his heires*). [k] As if a man devise 20 acres to another, and that he shall pay to his executors for the same ten pound, hereby the de-

visee

22. Eliz. Dier 371. Temps. H. 8. tit. Conscience Br. 25. (3. Co. 21.)
34. H. 6. 7. 19. H. 8. 9. 3. Co. 21. In Borafton's case, 6. Co. 16, 17.

[*] Vide Sect. 59. and 66.
[b] Mirror c. 2. sect. 15. & c. 5. sect. 1. Bract. lib. 2. fo. 53. 366. 368.
Fleta lib. 3. ca. 1, 2. 15.
Britt. 84. 87. a. & fol. 63. 101, 102. 141, 142. agreeth herewith. Pl. Com. 171. Hill & Grange. Mirror ca. 5. sect. 1. Britton cap. 34.

For the antiquity of Feoffments, see the Second Part of the Institutes, Marbridge, ca. 9. 8. E. 3. 24. 18. H. 6. 14. 39. H. 6. 39. * Genesis 23.

† Vide Sect. 57. Britton cap. 34. 44. E. 3. 41. See more of Feoffments, Sect. 6c. See of Factum, Sect. 259.

3. Co. 63. in Lincolne Colledge case. (1. Ro. Abr. 833. 6. Co. 16. b.)

[i] Litt. lib. 3. c. de Attorn. Sect. 5. 8. 6. 4. E. 6. Estates Br. 78. 29. H. 8. Testaments 18.

[k] 21. E. 3. 16. 10. Co. 67.

(5) See more as to the word *feoffment*, in Mad. Formul. Angl. Dissert. p. 3. 2. Inst. 110.

(1) See further as to the distinction

between *charters* and *deeds*, and the various other names of writings before and since the Conquest, in Mad. Form. Angl. Dissert. p. 2. and Mad. Hist. Exch. Pref. Ep. p. 8.

[1] Vide Sect.
585.

[m] Mich. 40.
& 41. Eliz. in
Error int. Down-
hall & Catesby
adjudge. Brooke
tit. Taille 21.

[n] 1. Co. 100.
Shellye's case.

42. E. 3. 7.

19. H. 6. 17. b.
22 b.

Pl. Com. 248.

[o] Litt. lib. 2.
ca. Tenant in
Common. Sect.

304, 305. cap.
A. torn. Sect.

374. Dier.

9. Eliz. 263.

[p] Litt. lib. 3.
c. Releases.

Sect. 479, 480.

20. H. 6. 17.

19. H. 6. 17. 22.

[q] Litt. cap.
Releases, Sect.

467.

27. H. 6. Lo.
Vescie's case.

(7. Co. 33. b.)

visée hath a fee simple by the intent of the devisor (2), albeit it be not the value of the land. [1] So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or in *feodo simplici*, or to him and to his assigns for ever. In these cases a fee simple doth passe by the intent of the devisor. But if the devise be to a man and his assigns without saying (for ever), the devisee hath but an estate for life. [m] If a man devise land to a man *et sanguini suo*, that is a fee simple; but if it be *semini suo*, it is an estate taile (3).

[n] Secondly, that it extendeth not to a *fine sur corusans de droit come ceo que il ad de son done*, by which a fee also may passe without this word (heires) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, nor to *certain releases*, and that three manner of waies.

[o] First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs,) by *Littleton's own opinion they have a fee simple*, as appeareth hereafter. 2. By release [p], when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c. release to the tenant of the land generally all his right, &c. hereby the seignior, rent, &c. are extinguished for ever, without these words (heires).

3. [q] When a bare right is released, as when the disseisor release to the disseisor all his right, he need not (saith our author in another place) speake of his heires. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a recovery.

A. seised of land suffereth B. to recover the land against him by a common recovery, where the judgment is, *quod prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin'*; yet B. recovereth a fee simple without this word (heires); for regularly every recoveror recovereth a fee simple. 5. Nor to a creation of nobilitie by writ, for when a man is called to the upper house of parliament by writ, he is a baron and hath inheritance therein without the word (heires). (4) Yet may the king limit the generall state of inheritance created by the law and custome of the realme to the heires males, or generall, of his body by the writ; as he did to *Bromflete*, who in 27. H. 6. was called to parliament by the name of the lord *Vescie*, &c. with the limitation in the writ to him and the heires males of his bodie. But if he be created by patent, he must of necessity have these words (his heires) or the heires males of his bodie, or the heires of his body, &c. otherwise he hath no inheritance. The first creation of a baron by patent that I finde was of *John B. auchampe* of *Holte*, created baron by patent in 11. R. 2. (5) for barons before that time were called by writ. And it is to be observed, that of ancient times earles, &c. were created by girding them with a sword, and nominating him earle, &c. of such a countie or place; and this, with a calling of him to parliament by writ by that name, was a sufficient creation of inheritance.

But

(2) [See Note 50.]

(3) As to the passing of an estate of inheritance in *last wills*, without the word *heires*, see the title *Devise*, in the several Abbridgements of Law and Equity, and *Gilb. Law of Devises*.

(4) See as to this, *mr. serj. Rolle's argu-*

ment in *Coll. Proc. on Claims of Baronies*, 209 221.

(5) *Acc. post. 16. b. Seld. Jan. Angl. b. 2. c. 15. and Seld. Tit. Hon. 2d ed. p. 747. which latter book contains the form of the letters patent to lord Beauchamp.*

But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall passe without these words (his heires). For example, first, [r] if the father infeoffe the sonne, to have and to hold to him and to his heires, and the sonne infeoffeth the father as fully,

as the father infeoffed him, by this the father hath a fee simple, (6)

quia verba relata hoc maxime operantur per referentiam ut in esse videntur. [/] Secondlie, in respect of the consideration, a fee simple had passed at the common law without this word (heires), and at this day an estate of inheritance [in] tayle. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (heires); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posteritie. [t] Thirdly, if a feoffment or grant be made by deed to a mayor and communaltie, or any other corporation aggregate of manie persons capable, they have a fee simple without the word (successors); (7) because in judgment of the law they never dye. [u] Fourthly, in case of a sole corporation a fee simple shall sometime passe without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him in liberâ eleemosinâ, a fee simple doth passe without this word (successors). [w] And so if a man give lands to the king by deede inrolled, a fee simple doth passe without these words (successors or heires); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall passe without this word (heires). [x] As if partition be made betweene coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heires) (1); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipse etenim leges cupiunt ut jure regantur*. Sixthly, by the forreist law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heires) [y]; for there is a speciall law of the forest, as there is a law marshall for wars, and a marine law for the seas [z].

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that enure by way of enlargement of estates, warranties, bargain and sales by deed indented and inrolled, and the like, in which this word (heires) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus* (2).

And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example; for so our author himselfe in another place * explaneth it, saying, *et memorandum que en tous autres [tiels] casés, coment que ne sont icy expressement moives et specifiques, si sont en semblable raison*

(6) Adj. contra 39. lib. Ass. pl. 12. but Rolle abridges the case with a *quare*. See 1. Ro. Abr. 833. pl. 7.

(7) [See Note 51.]

(1) Acc. Plowd. 134. b.

(2) For other instances in which a fee

will pass by deed or grant without the word *heirs*, see Vin. Abr. *Estate*, K. 2. and L. To the cases in Viner, add 8. H. 4. 4. 16. b. 19. H. 6. 17. 20. H. 6. 36. 27. H. 8. 8. b. Dy. 169. which I do not see cited by him. See also Ash. Repertor. tit. *Estate*.

[r] 39. Ass. 12. 41. E. 3. tit. Feoffments & Faits 254. 14. H. 4. 13. 34. E. 3. Avowry 258. [/] Vide Sect. 17. 12. H. 4. 19. in Formedon.

[t] 8. E. 3. 27. 11. H. 7. 12. 22. E. 4. 11. H. 4. 84. 2. H. 4. 13. [u] 19. H. 6. 74. 20. H. 6. 36. (1. Ro. Abr. 43.)

[w] Pl. Com. Lo. Berkeley's case.

[x] 29. Ass. 23. 15. H. 7. 14. 2. H. 7. 5. 11. H. 4. 3. 21. E. 3. 1. 21. Ass.

[y] 40. H. 7. 7. (4. Inst. 314.) [z] 22. E. 3. 3. 45. E. 2. 20. 6. E. 3. 22. 4. Co. 1. Buxard's case. Vide Sect. 465. 469. 610. 19. H. 6. 17. 22. 19. E. 2. garr. 85.

* Sect. 301.

raison font en semblable ley. And here our author is to be understood to speak of heires when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to B. and his heires, having issue divers sons, all his sons after his decease shall inherit (3); but if a lease for life be made, the remainder to the right heires of B. and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heire by the common law (4). So note a diversity betweene a purchase and a descent. But where the remainder is limited to the right heires of B. it need not be said, and to their heires; for being plurally limited it includeth a fee simple, and yet it resteth but in one by purchase.

Out of that which hath beene said it is to be observed, that a man may purchase lands to him and his heires by ten manner of conveyances (for I speake not here of estoppells). First, by feoffment. Secondly, by grant (of which two our author here speaketh). Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance, and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by release to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reversion or remainder with attornment of the particular tenant, of all which our author speaketh hereafter. Ninthly, by bargain and sale by deede indented and inrolled, ordained by statute since *Littleton* wrote. Tenthly, by devise by custome of some particular place, as he sheweth hereafter, and since he wrote, by will in writing, generally by authority of parliament.

What words are apt words for a feoffment or grant *vide* Sect. 531. Our author speaketh of feoffments and grants, whereby is implied lawfull conveyances; and therefore this rule extendeth not to disseisins, abatements, or intrusions into lands or tenements, or to usurpations to advowsons, &c. in which cases estates in fee simple are gained by the act and wrong of the disseisors, abators, intruders, and usurpers (5); and if a disseisin, abatement, or intrusion be made to the use of another, if *cestui que use* agreeth thereunto in *pays*, by this bare agreement he gaineth a fee simple without any livery of seisin or other ceremony.

(3) [See Note 52.]
(4) [See Note 53.]

(5) See ante 3. b. and post. 18. b.

Sect. 2.

ET si home purchase terres en fee simple et deuy sans issue, chescun que est son prochein cosin collateral del entiere sanke, de quel plus long degree qu'il soit (6), poet inheriter et aver meme la terre come heire a luy.

AND if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how farre so ever he be from him in degree, may inherite and have the land as heire to him.

LITTLETON sheweth here who shall be heire to lands in fee (Plowd. 444.) simple; for he intendeth not this case of an estate taile, for that he speaketh of an heire of the whole blood, for that extendeth not to estates in taile, as shall be said hereafter in this Chapter, Section 6.

“Prochein cosin collateral.” Neither excludeth he brethren or sisters, because he hath a speciall case concerning them in this Chapter, Sect. 5. and in his Chapter of Parceners; but this is intended where a man purchaseth lands and dieth without issue, and having neither brother nor sister, then his next cousin collateral shall inherite (1). So as here is implied a division of heires, viz. lineall (whoever shall first inherite) and collateral (who are to inherite for default of lineall). For in descents it is a *maxime* in law, *quod linea recta semper præfertur transversali*. Lineall descent is conveyed downward in a right line; as from the grandfather to the father, from the father to the sonne, &c. Collateral descent is derived from the side of the lineall; as grandfather's brother, father's brother, &c. *Prochein cosin collateral enheritera* doth give a certain direction to the next cousin to the sonne, and therefore the father's brother and his posterity shall inherite before the grandfather's brother and his posterity. *Et sic de cæteris*; for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem*.

Upon this word (*prochein*) I put this case. One hath issue two sonnes, *A.* and *B.* and dieth; *B.* hath two sonnes, *C.* and *D.* and dieth. *C.* the eldest sonne hath issue and dieth. *A.* purchaseth lands in fee simple, and dieth without issue. *D.* is the next cousin, and yet shall not inherite, but the issue of *C.*; for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of *next*, viz. next *jure representationis*, and next *jure propinquitatis*; that is, by right of representation and by right of propinquity. And Littleton meaneth of the right of representation, for legally in course of descents he is next of blood inheritable. And the issue of *C.* doth represent the person of *C.*; and if *C.* had lived, he had been legally the next of blood. And whensoever the father, if he had lived, should have inherited, his lineall heire by right of representation shall inherite before any other, though another be *jure propinquitatis*, nearer of blood. And therefore Littleton intendeth his case of next cousin of blood immediately inheritable. So as this produceth another division of next blood, viz. immediately

Glanvill. lib. 7.
ca. 3, 4.
Braft. lib. 2.
c. 30. fo. 65.
Britton cap. 119.
Fleta lib. 6.
cap. 1. & 2.
(Plowd. 444.)
Braft. lib. 2.
cap. 30. fo. 64.
Fleta lib. 5.
cap. 5. & lib. 6.
cap. 1. & 2.
Britton cap. 119.
Mirror 11.
cap. 1. sect. 3.
30. Aff. p. 47.
(3. Co. 40. 42.)

19. R. 2. tit.
Garr. 199.

①

(2. Inst. 7.)

(6) *de lui*, L. and M. Roh. Red.

(1) [See Note 54.]

30. Aff. p. 47.

immediately inheritable, as the issue of C.; and mediately inheritable, as D. if the issue of C. die without issue; for the issue of C. and all that line, be they never so remote, shall inherit before D. or his line; and therefore *Littleton* saith well, *de quel plus long degree que il soit*. And here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore in the case before mentioned, if a lease for life were made to A. the remainder to his next of blood in fee; in this case, as hath been said, D. shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heire by descent (2).

(2)

Sect. 3.

MES si soit pier et fits, et le pier ad un frere que est uncle a le fits, et le fits purchase terre en fee simple et mort sans issue, vivant son pier, l'uncle avera la terre come heire al fits, et nemy le pier, uncore le pier est plus prochein de sanke; pur ceo que est un maxime en le ley, que enheritance poet linealment discender, mes nemy (3) ascender. Uncore si le fits en tiel case mort sans issue, et son uncle entra en la terre come heire a le fits (sicome il devoit per la ley) et apres l'uncle devia sans issue, vivant le pier, donques le pier avera la terre come heire al uncle, et nemy come heire a son fits, pur ceo que il veigne al terre per collateral discent et nemy per lineal ascencion.

BUT if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heire to the son, and not the father, yet the father is neerer of blood; because it is a maxime in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heire to the sonne (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heire to the uncle, and not as heire to his sonne, for that he commeth to the land by collateral discent and not by lineall ascent.

5. E. 6. tit. Ad-
ministr. Br. 47.
Ratcliffe's case
ubi sup. See
after in the
Chapter of
Secage.
(Hob. 33.)
(3. Co. 40.)

“**U**NCORE le pier est plus prochein de sanke.” And therefore some do hold upon these words of *Littleton*, that if a lease for life were made to the sonne, the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle, for that *Littleton* saith the father is next of blood, and yet the uncle is heire. As if a man hath issue two sons, and the eldest sonne hath issue a sonne and die, a remainder is limited to the next of his blood, the younger son shall take it, yet the other is his heire.

[p] Pl. Com.
293. b.
Osborne's case.

(Post. 67.)
[q] Pl. Com. 27.
b. (3. Co. 40.)

“ [p] Est un maxime en le ley, que inheritance poet linealment discender, mes nemy ascender.”

Maxime, i. e. a sure foundation or ground of art, and a conclusion of reason, so called [q] *quia maxima est ejus dignitas et certissima autoritas, atque quod maximè omnibus probetur*, so sure and

[11.a.]

(1) [See Note 55.]

(3) linealment—P. and Red.

and uncontrollable as that they ought not to be questioned. [r] And that which our author here and in other places calleth a maxime, hereafter he calleth a principle; and it is all one with a rule, a common ground, *postulatum*, or an *axiome*, and it were too much curiositie to make nice distinctions betweene them. And it is well said in our bookes, [s] *n'est my a disputer l'ancien principes del ley*. I never read any opinion in any booke old or new against this maxime, but only in *lib. rub.* where it is said, [t] *si quis sine liberis decesserit, pater aut mater ejus in hæreditatem succedat, vel frater et soror si pater et mater defint; si nec hos habeat, soror patris vel matris, et deinceps qui propinquiores in parentelâ fuerint hæreditariò succedant; et dum virilis sexus extiterit, et hæreditas abinde sit, femina non hæreditat*. But all our ancient authors and the constant opinion ever since do affirme the maxime.

By this maxime in the conclusion of his case, onely lineall ascension in the right line is prohibited, and not in the collaterall. [u] *Quælibet hæreditas naturaliter quidem ad hæredes hæreditabiliter descendit, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi ponderosum, quod cadens deorsum rectâ lineâ vel transversali, et nunquam reascendit eâ viâ quâ descendit post mortem antecessorum, à latere tamen ascendit alicui propter defectum hæredum inferius provenientium*; so as the lineall ascent is prohibited by law, and not the collaterall (1). And in prohibiting the lineall ascent, the common law is assisted with the law of the 12 tables (2).

Here our author for the confirmation of his opinion draweth a reason and a prooffe (as you have perceived) from one of the maxims of the common law. Now that I may here observe it once for all, his proofes and arguments, in these his three books, may be generally divided into two parts, viz. from the common law and from statutes, of both which, and of their severall branches, I shall give the studious reader some few examples, and leave the rest to his diligent observation.

For the common law his proofes and arguments are drawn from 20 severall fountaines or places.

[a] First, from the maxims, principles, rules, intendment and reason of the common law, which indeed is the rule of the law, as here and in other places our author doth use.

[b] Secondly, from the bookes, records, and other authorities of law cited by him *ab autoritate, et pronuntiatis*.

[c] Thirdly, from originall writs in the Register, *à rescriptis valet argumentum*.

[d] Fourthly, from the forme of good pleading.

[e] Fifthly, from the right entrie of judgements.

[f] Sixtly, *à præcedentibus approbatis et usu*, from approved precedents and use.

[g] Seventhly, *à non usu*, from not use.

[h] Eightly, *ab artificialibus argumentis consequentibus et conclusionibus*, artificiall arguments, consequents and conclusions.

Ninthly,

170. 183. 369.
[g] 108. 733.
626. 739.

[e] Sect. 248, 249.

[b] Sect. 170. 264. 283. 302. 429. 464. 629. 633. 686. 340. 418. 613

[f] Sect. 88. 74. 76. 145. 332. 371. 372. 445.
[d] Sect. 58.

[r] Sect. 90.
648.

[s] 12. H. 4.
Glanvill. lib. 7.
cap. 1. Braet.
lib. 2. cap. 29.

[t] Lib. Rub.
cap. 70.

[u] Brit. cap.
119. Fleta lib. 6.
ca. 1. Numb.
ca. 27. Ratchiff's
case ubi supra.
(3. Co. 40.)

[a] Sect. 5. 8.
90. 96. 52. 53.
57. 59. 65. 99.
130. 146. 156.
169. 178. 231.
293. 302. 352.
360. 376. 377.
396. 410. 440.
441. 346. 347.
462. 43.
[b] Sect. 20.
where a number
of others are
quoted.

[c] Sect. 67. 132.
170. 234. 241.
263. 613. 614.
(Plowd. 228.)

(1) [See Note 56.]

(2) [See Note 57.]

[i] Sect. 697.
59. 104. 288.
332. 478.
[k] S. E. 87.
where many
others are
quoted.
[l] Sect. 13.
where many
more are quot-
ed, but see
chiefly Sect. 281.
[m] Sect. 438,
439. 441.
[n] Sect. 18.
[o] 301, &c.
[p] 291. 298.
409, &c.
[t] 129. 440.
[q] Sect. 46.
194.
[*] Sect. 360.
[r] Sect. 722.
[s] Sect. 114.
223. 129. 211.
107. 108.
[t] Sect. 202.
[u] Sect. 440.
[w] Sect. 481.
[x] Sect. 13, &c.
Sect. 731. 692.
635. 633. 441.
103. 193. 154.
140. 2.
(Plowd. 57. b.
49. b.)
[y] Sect. 464.
(Cro. Ja. 474.)
[z] Sect. 731. 685. (Plowd. 105.)
[a] 17. E. 3.
Rot. Parl. nu.
19. 25. E. 3.
cap. 1. Regist.
inter Jura regia
61, &c.
(Post. 360.)
[b] Commonly
spoken of in
Parliament
Rolls.
(4. Inft. 14.
Post. 15. b.)
[c] 13. E. 4. 9.
7. Co. Calvin's
case, Pl. Com.
Sharrington's
case.
(Dr. and Stud.
Dial. 1. c. 2.)
[d] This law
appeareth in our
bookes and judiciall records.
[e] These are of record in Rolls of Parliament.
[f] Whereof
you shall read in our author, and in our bookes.
[g] Rot. Parl. 2. R. 2. nu. 3. 13. R. 2. ca. 2.
(Post. 249.)
[h] 7. Co. Candrie's case, articul. super cartas, &c.
[i] 37. H. 6. 21.
Forteic. ca. 32. 13. H. 4. 4. 28. H. 8. ca. 15.

Ninthly, [i] à *communi opinione jurisprudentium*, from the common opinion of the sages of the law.

Tenthly, [k] *ab inconvenienti*, from that which is inconvenient.

Eleventhly, [l] à *divisione*, from a division, *vel ab enumeratione partium*, from the enumeration of the parts.

Twelfthly, [m] à *maiore ad minus*, from the greater to the lesser, or [n] from the lesser to the greater [o] à *simili* [p] à *pari*.

13. [t] *Ab impossibili*, from that which is impossible.

14. [q] *A fine*, from the end.

15. [*] *Ab utili vel inutili*, from that which is profitable or unprofitable.

16. [r] *Ex absurdo*, for that thereupon shall follow an absurditie, *quasi à furdo prelatum*, because it is repugnant to understanding and reason.

17. [s] *A naturâ et ordine naturæ*, from nature, or the course of nature.

18. [t] *Ab ordine religionis*, from the order of religion.

19. [u] *A communi præsumptione*, from a common presumption.

20. [w] *A lectionibus jurisprudentium*, from the readings of learned men of law.

From statutes his arguments and proofes are drawne,

1. [x] From the rehearfall or preamble of the statute.

2. By the bodie of the law diversly interpreted.

Sometime by other parts of the same statute, which is *bene dicta expositio, et ex visceribus causæ*.

[y] Sometime by the reason of the common law. But ever the generall words are to be intended of a lawfull act, [z] and such interpretation must ever be made of all statutes, that the innocent or he in whom there is no default may not be dam-
nified (1).

(Plowd. 105.)

“*En la ley.*” There be divers lawes within the realme of England. As first, [a] *Lex coronæ*, the law of the crowne.

2. [b] *Lex et consuetudo parliamenti*. *Ista lex est ab omnibus quærenda, à multis ignorata, à paucis cognita.*

3. [c] *Lex naturæ*, the law of nature.

4. [d] *Communis Lex Angliæ*, the common law of England, sometime called *lex terræ*, intended by our author in this and the like places.

5. [e] Statute law. Lawes established by authority of parliament.

6. [f] *Consuetudines*, Customes reasonable.

7. [g] *Jus belli*, the law of armes, war, and chivalrie, *in republicâ maxime conservanda sunt jura belli.*

8. [h] Ecclesiastical or canon law in courts in certaine cases.

9. [i] Civil law in certaine cases not onely in courts ecclesiastical, but in the courts of the constable and marshall, and of the admiraltie, in which court of the admiraltie is observed *la ley Olyron*,

anno

[e] These are of record in Rolls of Parliament. [f] Whereof you shall read in our author, and in our bookes. [g] Rot. Parl. 2. R. 2. nu. 3. 13. R. 2. ca. 2.

[h] 7. Co. Candrie's case, articul. super cartas, &c. [i] 37. H. 6. 21.

13. H. 4. 4. 28. H. 8. ca. 15.

(1) As to the construction of statutes, see lord ch. Hatt. Treat. on Stat.—Ash. Expof.

Stat. by Eq.—Vin. Ab. Statutes, E. 6.—Com. Dig. Parliament. R. 10.

[11. b.]

anno 5. of Richard the first, so called, because it was published in the isle of Olyron.

10. [k] *Lex forestæ*, forest law.
11. [l] The law of marque or reprisall (2)
12. [m] *Lex mercatoria*, merchant, &c.
13. [n] The lawes and customes of the isles of Jersey, Guernsey and Man.
14. [o] The law and privilege of the Stannaries.
15. [p] The lawes of the east, west, and middle Marches, which are now abrogated.

But hereof this little taste for our student, that he may be capable of that which he shall reade concerning these and others in records, and in our books, and orderly observe them, shall suffice.

27. E. 3. cap. 8. Fortescue 32. F. N. B. 117. 13. E. 4. 9. Rot. Parl. 6. H. 4. nu. 43. 10. H. 7. 16. 47. E. 3. 22. 30. E. 1. Account 127. Carta Mercatoria. 31. E. 1. Rot. Patent. (4. Inst. 237.) [n] Mich. 41. E. 3. coram rege in Thesaur. 12. E. 3. 5. b. 12. H. 8. fol. 5. Rot. Pat. an. 20. E. 1. 7. Co. Calvin's case, fol. 21. Regist. fol. 22. [o] 50. E. 3. Rot. Parl. 50. E. 3. Rot. Patent, &c. [p] 31. H. 6. ca. 3. 4. Ja. c. 1.

[k] Carta de Foresta, &c. the eires of the Forests.
[l] 27. E. 3. ca. 17. Wi. ca. 23. 4. H. 5. ca. 7.
[m] Mirror des Just c. 1. Braff. 334 444. Fleta lib. 2. ca. 51, 52, &c.
5. E. 3. 11. 38. E. 3. 7.

"*Et son uncle enter en la terre.*" For if the uncle in this case doth not enter into the land, then cannot the father inherit the land; for there is another maxime in law herein implied, [q] that a man, that claimeth as heire in fee simple to anie man by descent, must make himself heire to him that was last seised of the actuall freehold and inheritance (3). And if the uncle in this case doth not enter, then had he but a freehold in law, and no actuall freehold, but the last that was seised of the actuall freehold was the sonne to whom the father cannot make himself heire; and therefore Littleton saith, *et son uncle enter en la terre (sicome devoit per la ley)* to make the father to inherit, as heire to the uncle. [r] Note, that true it is that the uncle in this case is heire, but not absolutely heire; for if after the descent to him the father hath issue a sonne or daughter, that issue shall enter upon the uncle (4). [s] And so it is if a man hath issue a sonne and a daughter, the sonne purchaseth land in fee and dyeth without issue, the daughter shall inherit the land; but if the father hath afterward issue a sonne, this sonne shall enter into the land as heire to his brother, and if he hath issue a daughter and no sonne, she shall be coparcener with her sister.

[q] 11. H. 4. 11. 10. Aff. 27. 34. Aff. p. 20. 19. E. 2. quar. impd. 177. 45. E. 3. 13. 40. Aff. p. 6.

[r] 11. Aff. p. 6. Doct. and Stud. 12. b. 32. H. 6. 35. [s] 19. H. 6. 61.

"*Sicome il devoit per la ley.*" These words as a key doe open the secrets of the law; for hereupon it is concluded, that where the uncle cannot get an actuall possession by entrie or otherwise, there the father in this case cannot inherit. And therefore if an advowson be granted to the sonne and his heires, and the sonne die without issue, and this descend to the uncle, and he die before he doth or can present to the church, the father shall not inherit, because he should make himself heire to the sonne, which he cannot doe. And so of a rent and the like. But if the uncle had presented to the church, or had seisin of the rent, there the father should have inherited. For Littleton putteth his case of an entry into land but for an example. If the sonne make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the reversion shall not descend to the father, because in that case he must make

(2) Besides the books more generally known, see Lee's Capt. in War, which is a Treatise on this subject,

(3) [See Note 18.]
(4) [See Note 19.]

Vid. Sect. 603.
718.
(Post. 329.)

Vid. Sect. 735,
736, 737.

35. H. 6. 33.
John Crook's
case.
(5. Co. 79.)

make himself heire to the sonne. *A.* infeoffes the son with warrantie to him and his heires, the sonne dies, the uncle enters into the land and dies, the father if he be impleaded shall not take the advantage of this warrantie, for then he must vouch *A.* as heire to his sonne, which he cannot doe (1); for albeit the warrantie descended to the uncle, yet the uncle leaveth it as he found it, and then the father by *Littleton's (devoit)* cannot take advantage of it. For *Littleton* Sect. 603. saith that warranties shall descend to him that is heire by the common law; and Sect. 718. he saith that everie warrantie which descends, doth descend to him that is heire to him which made the warrantie by the common law; which proveth that the father shall not be bound by the warrantie made by the sonne, for that the father cannot be heire to the sonne, that made the warrantie. And a warrantie shall not goe with tenements, whereunto it is annexed, to any especiall heire, but alwaies to the heire at the common law (2). And therefore if the uncle be seised of certaine lands, and is disseised, the sonne release to the disseisor, with warrantie, and die without issue, this shall bind the uncle; but if the uncle die without issue, the father may enter, for the warrantie cannot descend upon him. So if the sonne concludeth himselfe by pleading concerning the tenure and services of certaine lands, this shall bind the uncle; but if the uncle die without issue, this shall not bind the father, because he cannot be heire to the sonne, and consequently not to the estoppel in that case; but if it be such an estoppel as runneth with the land, then it is otherwise (3).

Sect. 4.

ET en tiel case lou le fits purchase terre en fee simple, et devie sans issue, ceux de son sanke de part son pier enheriteront come heires a luy, devant ascun de sanke de part sa mere: mes s'il n'ad ascun heire de part son pier, donques la terre descendra a les heires de part la mere (4). Mes si home prent (5) enheretrix des terres en fee simple, queux ont issue fits, et deviont, et le fits enter en les tenements, come fits et heire a sa mere, et puis devie sans issue, les beires de part la mere doient enheriter les tenements, et jammes les heires de part le pier. Et s'il ny ad ascun heire de part la

AND in case where the sonne purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherite as heires to him, before any of the blood on the mother's side: but if he hath no heire on the part of his father, then the land shall descend to the heires on the part of the mother. But if a man marieth an inheritrix of lands in fee simple, who have issue a sonne, and die, and the sonne enter into the tenements, as sonne and heire to his mother, and after dies without issue, the heires of the part of the mother

(1) [See Note 60.]

(2) See acc. both as to estoppels and warranties, Hob. 31. 8. Co. 54. but observe what is said by lord Hale in the preceding note.

(3) [See Note 61.]

(4) *Et cest l'opinion de toutes les justices M. 12. E. 4. Mes la suit tenu si terre descende a un home de part son pere, qui devia sans issue, que son prochain heire de part son pere enheritera a luy c'est assavoir le prochain que est del sank le pere de part l'ayel. Et pur*

defaute de tiel heire, ceux que sont de sank le pere del part le mere le pere, S. laiesse doient enheriter. Et s'il ny ad tiel heire de part le pere donques le seignour avera el terre par eschete. Red. But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12. E. 4. 14. pl. 12. which is indeed cited in the margin of Redman.

(5) *feme, L. and M.—Roh.—P.—Red.*

la mere, dunque le seignior, de que la terre est tenus, avera la terre per escheat. (1) En mesme le manner est, si tenements descendent a le fits de part le pier, et il enter, et puis morust sans issue, cel terre descendra as heires de part le pier, et nemy as heires de part la mere. Et s'il ny ad aucun heire de part le pier, donques le seignior de que la terre est tenus, avera la terre per escheat. Et sic vide diversitatem, lou le fits purchase terres ou tenements en fee simple, et lou il veient eins a tiels terres ou tenements per discent de part sa mere, ou de part son pier.

see the diversity, where the sonne purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

mother ought to inherit, and not the heires on the part of the father. And if he hath no heire on the part of the mother, then the lord, of whom the land is holden, shall have the land by escheate. In the same manner it is, if lands descend to the sonne of the part of the father, and he entrench, and afterwards dies without issue, this land shall descend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden, shall have the land by escheate. And so

BY this it appeareth, that our author divideth heires into heires of the part of the father, and into heires of the part of the mother. [a] And note, it is an old and true maxime in law, that none shall inherite any lands as heire, but only the blood of the first purchaser, for [*] *revert à quo fiat perquisitum*. As for example, Robert Coke taketh the daughter of Knightley to wife, and purchaseth lands to him and to his neires, and by Knightley hath issue Edward, none of the blood of the Knightleys, though they be of the blood of Edward, shall inherite, albeit he had no kindred but them, because they were not of the blood of the first purchaser, viz. of Robert Coke. (6)

30. 38. 49. E. 3. 12. 49. Aff. p. 4. 12. E. 4. 14. Pl. Com. 445. & 450. 7. E. 6. Dyer 6. 24. E. 3. 24. 37. Aff. 4. 40. E. 3. 9. 42. E. 3. 10. 45. E. 3. Releates 28. 7. H. 5. 3. 4. 8. Aff. 6. 35. Aff. 2. 5. E. 4. 7. 3. H. 5. 21. H. 7. 33. 40. Aff. 6. Ratcliff's case, 3. Co. 42. (Post. 220. b.)

“ [b] *Ceux del sank de part son pier.*” Here it is to be understood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (7), both these bloods are of the part of the father. [c] And this made ancient authors say, that if a man be seised of lands in the right of his wife, and is attainted of felony, and after hath issue, this issue should not inherit his mother, for that he could derive no blood inheritable from the father. And both these bloods of the part of the father must be spent before the heire of the blood of the part of the mother shall inherit, wherein ever the line of the male of the part of the father, (that is) the posteritie of such male, be they male or female, (who ever in descents are preferred) must faile before the line of the mother shall inherit. [d] And the reason of all this is, for that the blood of the part of the father is more worthie, and more neere in judgement of law, than the blood of the part of the mother.

Vid. Sect. 354. an excellent point.

[a] Pl. Com. Sir Edward Clere's case, 447.

[*] Fleta lib. 6. ca. 1, 2. &c. Bracton lib. 2. fol. 65. 67, 68, 69, &c. Britton ca. 119. 24. E. 3. 50. 39. E. 3. 29.

7. E. 6. Dyer 6. 19. E. 1. in Banco Rot. 25. Lincoln Will. See's case.

[b] Bracton ubi supra. Fleta ubi supra. Britton c. 118, 119. Pl. Com. 444. Clere's case. Tr.

19. E. 1. in Banco Rot. 25. Lincoln Will. See's case.

[c] Britton, fol. 15. Fleta, lib. 1. c. 18. Pl. Com. 445, 446, &c. Clere's case. (1. Sid. 200.) (Plowd. 444.) [d] 19. K. 2. gar. 100.

“ Devant

(1) All between *en mesme* and *sic vide* omitted in Red.

(6) And therefore if the heir of the part of

the father be attainted, the land shall escheat. 49. Aff. p. 4. Hal. MSS.

(7) [See Note 62.]

Britton cap. 118,
119.
Fleta lib. 6.
cap. 2.

"*Devant aucun del sanke del part del mere.*" And it is to be observed, that the mother hath also two immediate bloods in her, (viz.) her father's blood, and her mother's blood. Now to illustrate all this by example. *Robert Fairefield*, sonne of *John Fairefield* and *Jane Sandie*, takes to wife *Ann Boyes*, daughter of *John Boyes* and *Jane Bewpree*, and hath issue *William Fairefield*, who purchaseth lands in fee. Here *William Fairefield* hath foure immediate bloods in him, two of the part of his father, viz. the blood of the *Fairefields*, and the blood of the *Sandyes*, and two of the part of his mother, viz. the blood of the *Boyses*, and the blood of the *Bewprees*, and so in both cases upward in *infinitum*. Now admit that *William Fairefield* die without issue, first the blood of the part of his father, viz. of the *Fairefields*, and for want thereof the blood of the *Sandyes*; (for both these are of the part of the father) if both these faile, then the heires of the part of the mother of *William Fairefield* shall inherit, viz. first of the blood of the *Boyses*, and for default thereof the blood of the *Bewprees*.

It is necessary to be knowne in what cases the heire of the part of the mother shall inherite, and where not. If a man be seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherite. (2) If a man so seised maketh a feoffment in fee upon condition, and dye, the heire of the part of the father, which is the heire at the common law, shall enter for the condition broken, but the heire of the part of the mother shall enter upon him, and enjoy the land. [m] A man so seised maketh a feoffment in fee reserving a rent to him and to his heires, this rent shall goe to the heires of the part of the father; but [n] if he had made a gift in taile, or a lease for life reserving a rent, the heire of the part of the mother shall have the reversion, and the rent also as incident thereunto shall passe with it; but the heire of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can passe there-with.

9 H. 7. 24.
(Plowd. 57.
Post. 202.)

[m] 7. H. 6. 4.
1. Co. 100.
Shelley's case.

[n] 5. E. 2. tit.
avowry 207.
(Hob. 31.)

[o] 5. E. 3.
avowry 207.
(8. Co. 54.
3. Co. 32. b.)

[p] 5. E. 4. 4.
1. Co. 100.
Shelley's case.

27. H. 8. Dyer.
Buckenham's
case. 32. H. 8.

gard. Brooke 93.
13. H. 7. 6.

(2. Ro. Abr. 780.
Post. 23. a. 271.

b. 1. Co. 127.
Hob. 31. 2. Co.

58.)
[q] 16. E. 3.

age 46.

[o] If a man had been seised of a mannor as heire on the part of his mother, and before the statute of *Quia emptores terrarum*, had made a feoffment in fee of parcell to hold of him by rent and service, albeit they be newly created, yet for that they are parcell of the mannor, they shall with the rest of the mannor descend to the heire of the part of the mother, *quia multa transeunt cum universitate quæ per se non transeunt*. If a man hath a rent secke of the part of his mother, and the tenant of the land granteth a distresse to him and to his heires, and the grantee dieth, the distresse shall go with the rent to the heire of the part of the mother, as incident or appurtenant to the rent, for now is the rent secke become a rent charge (1).

[p] A man so seised as heire on the part of his mother maketh a feoffment in fee to the use of him and his heires, the use being a thing in trust and confidence shall ensue the nature of the land (2), and shall descend to the heire on the part of the mother. [q] A man hath a feigniori as heire of the part of his mother, and the tenancy doth escheat, it shall go to the heire of the part of the mother. If the heire of the part of the mother of land whereunto

a warranty

(2) [See Note 63.]

[13. a.]

(1) Acc. 8. Co. 54. a.

(2) [See Note 64.]

[13. a.]

a warranty is annexed is impleaded and vouchè, and judgment is given against him, and for him to recover in value, and he dieth before execution [r], the heire of the part of the mother shall sue execution to have in value against the vouchèe, for the effect ought to pursue the cause, and the recompence shall ensue the losse.

[r] Pl. Com. 292. and 515. See more of this in the Chapter of Warranties.

(6) If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are voidè, as in the case that Littleton putteth in this Chapter. If a man giveth lands to a man to him and his heires males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.

(Post. 27. a.)

(7) A man hath issue a sonne, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heires of the wife, the sonne dieth without issue, the heires of the part of the father shall inherit, and not the heires of the part of the mother, because it vested in the sonne as a purchaser. And the rule of Littleton holdeth as well in other kind of inheritances, as in lands and tenements. [s] And therefore if there be lord, feme mesne, and tenant, and the mesne bind her selfe and her heires by her deed to the acquittall of the tenant, the mesne takes husband, the tenant by his deed granted to the husband and his heires, that he or his heires shall not be bound to acquittall, the husband and wife have issue, and die, this issue, being bound as heire to his mother, shall not take benefit of the said grant of discharge, for that extends to the heires of the part of the father, and not to the heires of the part of the mother, and therefore the heire of the part of the mother was bound to the acquittall (3). And thus much for the better understanding of Littleton's cases concerning the heire of the part of the mother shall suffice (4).

[s] 38. E. 3. 12.

“*Mes si home prist feme inheritrix, &c.*” Here there is another maxime, [t] that whensoever lands do descend from the part of the mother, the heires of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heires of the part of the mother shall never inherit (5). *Et sic paterna paternis, et è converso, materna maternis.* For more manifestation hereof, and of that which hereafter shall be said touching descents, see a Table in the end of this Chapter.

[t] 39. E. 3. 29. 49. E. 3. 12.

“*Avera la terre per escheat.*” [u] Escheat (6), *eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere, excidere* or *accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentie* or *terre excadentiales* [w]. *Dominus verò capitalis loco*

[u] Vide Sect. 130. Glanvill. lib. 7. cap. 17. Bract. lib. 3. fol. 118. Fleta lib. 5. cap. 5. & lib. 3. cap. 10. Britton cap. 37. & cap. 119.

F. N. B. 100. Tr. 19. E. 1. in Banco Rot. 25. (3. Inst. 21. 4. Inst. 225. F. N. B. 144. b.) [w] Fleta lib. 6. cap. 1. Ockam cap. quod non absolvitur, &c.

(3) [See Note 65.]

(4) [See Note 66.]

(5) [See Note 67.]

(6) See Wright's Ten. 115. Blackst. Law Tracts, 8vo. ed. v. 1. p. 236. and 2. Blackst. Comm. 5th ed. 241.

loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi. And Ockam (who wrote in the raigne of Henry the second) treating of tenures of the king, faith, *porro eschaetæ vulgò dicuntur, quæ decedentibus hiis qui de rege tenent, &c. cum non existit ratione sanguinis hæres, ad fiscum relabuntur.* [x] So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis, i. e. for default of heire, aut per delictum tenentis, i. e. for felonie,* and that is by judgment three manner of waies, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utilegatus est.* And therefore, they which are hanged by martiall law in *furore belli* forfeit no lands: and so in like cases escheats by the civilians are called *caduca*.

[x] Pl. Com.
Dame Hale's
case.
(Post. 92. b.)

[y] Pl. Com. in
Nicholl's case.

[y] The father is seised of lands in fee holden of *I. S.* the son is attainted of high treason, the father dieth, the land shall escheat to *I. S. propter defectum sanguinis*, for that the father dyed without heire. And the king cannot have the land, because the sonne never had any thing to forfeit. But the king shall have the escheate of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden (7).

[z] 38. E. 3.
f. 37. 30. H. 6. 5.
Bract. l. 2. tit.
de Forf. Stamf.
Pl. Cor. 192.
and according to
this diversity was
it resolved in
5. E. 6. as it
appeareth by my
lord Dier's Ma-
nuscript.
(Post. 390. b.)
(W. Jo 217.
Cro. Cha. 172.)

[z] In an appeale of death or other felony, &c. processe is awarded against the defendant, and hanging the processe the defendant conveyeth away the land, and after is outlawed, the conveyance is good (8) and shall defeat the lord of his escheat; but if a man be indicted of felony, and hanging the processe against him, he conveyeth away the land, and after is outlawed, the conveyance shall not in that case prevent the lord of his escheate. And the reason of this diversity is manifest: for in the case of the appeale, the writ containeth no time when the felony was done, and therefore the escheate can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the escheate upon the outlawry shall relate to that time (1). Which cases I have added, to the end the student may conceive, that the observation of writs, indictments, processe, judgments, and other entries, doth conduce much to the understanding of the right reason of the law.

[13. b.]

[a] Mirror ca. 1.
sect. 5. 51. H. 3.
statutum de
Seac. Britton
fo. 33, 34.
Flet lib. 1.
cap. 36. & lib. 2.
cap. 34, 35.
Regist. 301. his
Oath 18. E. 1.
Ro. Parl. 21. E. 1.
Rot. Parl. 1.
29. E. 1.
stat. de Eschae-
toribus. 14. E. 3.
c. 8. 28. E. 1.
ca. 18. F. N. B.
100. c. Stamf.
Præf. 81.
1. H. 8. ca. 8.
3 H. 8. ca. 2.
Capitula
Eschaetriae in
Vet. Magna
Carta fo. 160,
161, &c.

Of this word (*eschaeta*) here used by our author, commeth [a] *Eschaetor*, an ancient officer so called, because his office is properly to look to escheats, wardships, and other casualties belonging to the crowne. In ancient time there were but two escheats in *England*, the one on this side of *Trent*, and the other beyond *Trent*, at which time they had subescheators. But in the raigne of *Edward* the second, the offices were divided, and several escheators made in every county for life, &c. and so continued untill the raigne of *Edward* 3. And afterwards by the statute of 14. E. 3. it is enacted by authority of Parliament, that there should be as many escheators assigned, as when king *Edward* 3. came to the crown, and that was one in every county, and that no escheator should tarry in his office above a yeere, and by another statute to be in office but once in three yeares. The lord treasurer nameth him.

And hereof also commeth *eschaetria*, which signifieth the eschaetorship, or the office of the escheator. But now let us heare what our author will further say unto us.

(7) [See Note 68.]

(1) [See Note 70.]

(8) [See Note 69.]

“ *Et sic vide, &c.*” This kind of speech is often used by our author, and doth ever import matter of excellent observation, which you may find in the Sections noted in the margin *.

And it is to be well observed, that our author saith, *s’il n’ad ascun heire, &c. la terre eschaetera*. In which words is implied a diversity (as to the escheate) betweene fee simple absolute, which a natural body hath, and fee simple absolute, which a body politique or incorporate hath. [b] For if land holden of I. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat (2). And so if land be given in fee simple to a deane and chapter, or to a maior and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate. And the reason and the cause of this diversity is, for that in the case of a body politique or incorporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his naturall capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath beene said) no writ of escheat lyeth but in the three cases aforesaid, and not where a body politique or incorporate is dissolved.

* Sect. 147.
149. 248. 289.
417. 667, &c.
(2. Ro. Abr.
816.)

[b] 7. E. 4. 11.
12. Fitz. N. B.
33. 9. E. 3. 26.
17. E. 2. stat. de
templariis.

Sect. 5.

ITEM, si soient trois freres, et le mulnes frere purchase terres en fee simple et devie sauns issue, l’eigne frere avera la terre per discent, et nemy le puisne, &c. Et auxi si soient trois freres, et le puisne purchase terres en fee simple, et devie sans issue, l’eigne frere avera la terre per discent et nemy le mulnes, pur ceo que l’eigne est plus digne de sanke.

ALSO, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger (3), &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent and not the middle, for that the eldest is most worthy of blood.

NOW commeth our author to the descent betweene brethren, which he purposely omitted before. *Discent, descensus*, commeth of the Latine word *descendo*; and, in the legall sense, it signifyeth, when lands do by right of blood fall unto any (Post. 237.) after the death of his ancestors: or a descent is a meanes whereby one doth derive him title to certain lands, as heire to some of his ancestors. And of this, and of that which hath been spoken doth arise another division of estates in fee simple, viz. every man, that hath

(2) [See Note 71.]

(3) [See Note 72.]

hath a lawful estate in fee simple, hath it either by descent, or by purchase.

[c] Britton cap. 119. Bract. lib. 2. cap. 30. 277. 279. 3. E. 3. 26. 3. Eliz. Dyer 138. Stanford præ. 52. 58. 3. E. 1. tit. Avowry. 235. 32. E. 3. discent. 80. Bract. lib. 4. 211. Feta lib. 6. ca. 2. Glanvill. lib. 7. ca. 1. Mirror cap. 1. Sect. 3. * Glanvill. lib. 7. cap. 3. & ca. 1. Vid. Pl. Com. 229. b.

“ *L'eigne est plus digne de sanke.*” It is a maxime in law, that the next of the worthiest blood shall ever inherit, as the male and all descendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood. [c] And therefore among the males the eldest brother and his posterity shall inherit lands in fee simple as heire before any younger brother, or any descending from him, because (as Littleton saith) he is *plus digne de sanke*. *Quod prius est dignius est, and qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primò descendit ad primogenitum, eò quòd inventus est primò in rerum naturâ.* In king Alfred's time knights fees (1) descended to the eldest sonne, for that by division of them between males the defence of the realme might be weakened; but in those dayes socage fee was divided between the heires males, and therewith agreeth Glanvill. * *Cùm quis hæreditatem habens moriatur, &c. si plures reliquerit filios, tunc distinguitur utrùm ille fuerit miles, sive per feodum militare tenens, aut liber sockmannus, quia si miles fuerit aut per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in toto, &c. si verò fuerit liber sockmannus, tunc quidem dividetur hæreditas inter omnes filios, &c.* (2) But hereof more shall be said hereafter in his proper place.

[14. a.]

Sect. 6.

ITEM, est ascavoir, que nul sera terre de fee simple per discent come heire, a ascun home, si non que il soit son heire d'entire sanke. Car si home ad issue deux firs per divers venters, et l'eigne purchase terres en fee simple, et morust sans issue, le puisne frere n'avera la terre, mes l'uncle l'eigne frere, ou auter son procheine cosin ceo avera, pur ceo que le puisne frere est de demy sanke al eigne frere.

ALSO, it is to be understood, that none shall have land of fee simple by descent as heire to any man unlesse he be his heire of the whole blood. For if a man hath issue two sonnes by divers venters, and the elder purchase lands in fee simple, and dye without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cosin shall have the same, because the younger brother is but of halfe blood to the elder (5).

NO man can be heire to a fee simple by the common law, [d] but he that hath *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so as the halfe blood

[d] Bract. lib. 4. Idem, lib. 2. fo. 65. Britton ca. 119. Fleta 1. ib. 6. ca. 1. 1. E. 3. 19. John Gifford's case. 31. E. 3. Conterpl. de voucher 88. 40. Ass. 6. 4. E. 2. Formd. 49. Vid. Ratcliff's case, 3. Co. 40, 41.

(1) Here lord Coke writes, as taking it for granted, that feudal tenures subsisted in England before the Conquest. But this is a controverted point amongst our best

writers. See post. 64. a. where a note is given on this subject.

(2) [See Note 73.]

(5) [See Note 75.]

blood is no blood inheritable by descent; (3) because that he that is but of the halfe blood cannot be a compleat heire, for that he hath not the whole and compleate blood (4), and the law in descents in fee simple doth respect that which is compleat and perfect. And this maxime doth not onely hold where lands (whereof *Littleton* here speaketh) are claymed or demanded as heire, [e] but also in [e] 7. E. 4. 15. case of appeale of death: for if one brother be slaine, the other brother of the halfe blood shall never have an appeale (albeit he shall recover nothing therein either in the realtie or personaltie) because in the eye of the law he is not heire to him. Also this rule extends to a warranty, as our author himselfe elsewhere Sect. 737. holdeth (6).

(1. Ro. Abr. 629.)

[e] 7. E. 4. 15.

Sect. 737.

Sect. 7.

[14. b.]

ET si home ad issue fits et file per un venter, et fits per auter venter, et le fits del primer venter purchase terres en fee, et morust sans issue, la soer avera la terre per descent, come heire a sa frere (1), et nemy le puisne frere, pur ceo que la soer est de le entiere sanke a son eigne frere.

AND if a man hath issue a sonne and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heire to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

THIS is put for an example to illustrate been said, and needeth no explanation. Britton.

at which hath herewith agreeth Britton cap. 119.

Sect. 8.

ET auxi, ou home est seisie de terres en fee simple, et ad issue fits et file per un venter, et fits per auter venter, et morust, et l'eigne fits enter et morust sans issue, la file avera les tenements, et nemy le puisne fits, uncore le puisne fits est heire a le pere, mes nemy a son frere. Mes si l'eigne fits ne entra en la terre apres la mort son pere, mes morust devant ascun entrie fait per luy, donques le puisne frere poit entrer, et avera le terre come heire a son pere. Mes lou l'eigne fits en le case avant dit entra apres la mort.

AND also, where a man is seised of lands in fee simple, and hath issue a sonne and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heire to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may

(3) [See Note 74.]

(4) See what is observed on lord Coke's explanation of the meaning of the term whole blood, in 1. Sid. 200. See too 1. Vent. 424. and 2. P. Wms. 667.

(6) [See Note 76.]

[14. b.]

(1) a sa frere, omitted in L. and M. and Rob.

mort son pere, et ad ent possession, donques la soer avera la terre, quia possessio fratris de feodo simplici facit sororem esse hæredem. Mes si sont deux freres per divers venters, et l'eigne est seisie de terre en fee, et morust sans issue, [et son uncle entra come prochein heire a luy quel auxy morust sans issue, (1)] ore le puisne frere puit aver la terre come heire al uncle, pur ceo que il est de l'entier sanke a luy, coment que il soit de demy sanke a son eigne frere.

may enter, and shall have the land as heire to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be 2 brothers by divers venters, and the elder is seised of land in fee, and die without issue, and his uncle enter as next heire to him, who also dies without issue; now the yonger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.

“SEISIE de terres en fee simple.” These words exclude a seisin in fee taile, albeit he hath a fee simple expectant. [f] (2) And therefore if lands be given to a man and his wife, and to the heires of their two bodies, the remainder to the heires of the husband, and they have issue a sonne, and the wife dyeth, and he taketh another wife, and hath issue a sonne, the father dieth, the eldest son entreteth, and dieth without issue, the second brother of the halfe blood shall inherit; because the eldest sonne by his entry was not actually seised of the fee simple, being expectant but onely of the estate taile (3). And the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredem*, and here the eldest son is not possessed of the fee simple but of the estate taile (4). And where Littleton speaketh onely of lands, [g] yet there shall be *possessio fratris* of an use (5), of a feigniori, a rent, an advowson (6) and of other hereditaments.

[f] 24. E. 3. 24.
30. 31. E. 3.
Court. de
Vouch. 88.
32. E. 3. tit.
Voucher.
37. Aff. p. 4.
40. E. 3. 9.
42. E. 3. 10.
39. E. 3. fol. 13.
7. H. 5. 3.
(1. Ro. Abr.
627.)
(Cro. Cha. 411.
Post. 281.)
(3. Co. 40, 41.)
[g] 5. E. 4.
fo. 7. Pl. Com. fo. 58. in Wimbitte's case.

[b] 10. Aff. 27. “Et l'eigne firs enter.” [b] These words are materially added when the father dies seised of lands in fee simple, for if the eldest son doth not in that case enter, then without question the youngest sonne shall be heire, because as it has beene said before regularly he must make himselfe heire to him that was last actually seised (or to the purchaser), and that was to the father where the eldest sonne did not enter. And therefore Littleton addeth, that the sonne is heire to the father. [i] But when the eldest sonne in this case doth enter, then cannot the youngest sonne being of the halfe blood be heire to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases albeit the sonne doth not enter into lands descended in fee simple, the sister of the whole blood shall inherit,

[15. a.]

(1) All between the brackets omitted in Roh. edit.

(2) 7. H. 4. 16. Vid. 38. Aff. 8. Hal. MSS.

(3) Acc. Bro. Abr. Discent, pl. 13, 14. and 30. Scire Facias, pl. 126. and Execu-

tion 67. 1. Ro. Abr. 628. and see 1. Show. 245. and 3. Mod. 257.

(4) [See Note 77.]

(5) [See Note 78.]

(6) [See Note 79.]

inherit, and in some cases where the eldest sonne doth enter, yet the younger brother of the half blood shall be heire.

[k] If the father maketh a lease for yeares, and the lessee entreth and dieth, the eldest sonne dieth during the tearme before entry or receipt of rent, the younger sonne of the halfe blood shall not inherite, but the sifter (2); because the possession of the lessee for yeares is the possession of the eldest sonne, so as he is actually seised of the fee simple, and consequently the sifter of the whole blood is to be heire (3). The same law it is if the lands be holden by knights service, and the eldest sonne is within age, and the gardian entreth into the lands. And so it is if the gardian in socage enter (4).

[k] 5. E. 4. 7. b.
3. H. 7. 5.
8. Aff. p. 6.
45. E. 3. tit.
Releases 28.
(Post. 243.
Mo. 125.
3. Co. 40, 41.)

But in the case aforesaid, if the father make a lease for life or a gift in taile, and dyeth, and the eldest sonne dyeth in the life of tenant for life or tenant in taile, the younger brother of the halfe blood shall inherit; because the tenant for life or tenant in taile is seised of the freehold, and the eldest sonne had nothing but a reversion expectant upon that freehold or estate taile, and therefore the youngest sonne shall inherit the land as heire to his father, who was last seised of the actuall freehold. And albeit a rent had beene reserved upon the lease for life, and the eldest sonne had received the rent and dyed, yet it is holden by some * that the younger brother shall inherite, because the seisin of the rent is no actuall seisin of the freehold of the land. But 35. Aff. pl. 2. seemeth to the contrary, because the rent issueth out of the land and is in lieu thereof (5), wherein the onely question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sifter may in a writ of right make herselfe heire of this land to her brother. But it is cleere, that [l] if there be bastard *eigne*, and *mulier puisne*, and the father maketh a lease for life or a gift in taile reserving a rent and die, and the bastard receive the rent and dye, this shall barre the *mulier*, for the reason of that standeth upon another maxime, as shall manifestly appeare in his apt place, Sect. 399.

* 7. H. 5. 34.
per Halls &
Logdington.
35. Aff. p. 2.

[l] 14. E. 2.
Bastard 26. Vid.
Sect. 399.
(Post. 244. a.)

"*Seisie des terres.*" [m] (6) But in this case, if the eldest sonne doth enter and get an actuall possession of the fee simple, yet if the wife of the father be indowed of the third part and the eldest sonne dyeth, the younger brother shall have the reversion of this third part notwithstanding the elder brother's entry; because that his actuall seisin which he got thereby was by the endowment defeated (7). But if the eldest sonne had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life.

[m] 7. H. 5. 2.
3. 4.

(8. Co. 35. b.
Post. 191. b.
4. Co. 58. b.)

"*Enter.*" Hereupon the question groweth, whether if the father be seised of divers severall parcels of lands in one county, and after the death of the father the sonne entreth into one parcell generally, and before any actuall entry into the other dyeth, this generall entry

(2) [See Note 80.]

(3) [See Note 81.]

(4) [See Note 82.]

(5) [See Note 83.]

(6) See post. 31. a.

(7) [See Note 84.]

entry into part shall vest in him an actual seisin in the whole, so as the filter shall inherit the whole. And this is a *quare* in 21. H. 7. 33. a. (8).

21. H. 7. 33. a.

(Post. 252. b.)

(1. Leon. 265.)

And some doe take a diversitie when an entry shall vest, or deveest an estate, that there must be severall entries into the several parcels, but where the possession is in no man, but the freehold in law is in the heire that entreth, there the generall entry into one part reduceth all into his actual possession. And therefore if the lord entreth into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcell generally, the entry shall not vest nor deveest in these or like cases, but for that parcell. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heire, and the possession in no man, there the entry into parcel generally seemeth to vest the actuall possession in him in the whole. But if his entry in that case be speciall, viz. that he enter only into that parcell and into no more, there it reduceth that parcell only into actuall possession.

[15. b.]

[g] 19. E. 2.
quare impd.

177. 3. H. 7. 5.

[b] 7. E. 3. 66.
tit. bar. 293.

3. H. 7. 5.
(Post. 29. a.)

"*Home seise des terres.*" What then is the law of a rent, advowson, or such things that lie in grant? [g] If a rent, or an advowson, do descend to the eldest sonne, and he dyeth before he hath seisin of the rent, or present to the church, the rent or advowson (1) shall descend to the yongest sonne, for that he must make himselfe heire to his father, as hath beene oftentime said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [b] And this case differeth from the case of the tenant by the courtesie, for there if the wife dieth before the rent day, or that the church become voyd, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesie of England. But the case of the descent to the yongest sonne standeth upon another reason, viz. to make himselfe heire to him that was last actually seised, as hath beene said.

[i] 8. E. 3. 11.
49. E. 3. 12.
Ratcliffe's case.
3. Co. 41.

"*En fee simple.*" [i] For halfe blood is not respected in estates in taile, because that the issues doe claime in by descent, *per formam doni*, and the issue in taile is ever of the whole blood to the donee (2).

[k] Bracton lib.
2. fo. 65. & lib.
4. fol. 279.
Britton cap. 119.
Flet. li. 6. c. 1.
24. E. 3. 30.

[l] Ratcliffe's
case. 3. Co. 42.

[m] Britton cap.
119.

"[k] *Possessio fratris de feodo simplici facit sororem esse hæredem.*" Hereupon foure things are to be observed, every word almost being operative, and materiall. First, that the brother must be in actuall possession; for *possessio est quasi pedis positio*. Secondly, *de feodo simplici* exclude estates in taile. Thirdly, *facit sororem esse hæredem*. So as [l] *soror est hæres facta*, and therefore sonre act must be done to make her heire, and the yonger sonne is *hæres natus [m]* if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the yonger brother. Fourthly, Of dignities, whereof no other possession can be had but such as descend (as

(8) Adjudged accordingly in the point
P. 4. Eliz. B. R. Hal. MSS.

(2) 8. E. 3. 11. 12. E. 4. 19. 49. E. 3.
12. 4. E. 2. Formedon 49. Hal. MSS.

(1) [See Note 85.]

(as to be a duke, marquesse, earle, vicount, or baron) to a man and his heires, there can be no possession of the brother to make the sister inherit (3), but the younger brother, being heire (as *Littleton* saith) to the father, shall inherit the dignitie inherent to the blood, as heire to him that was first created noble. (Cro. Cha. 601.)

And you shall understand that concerning descents there is a law, parcell of the lawes of *England*, called *jus coronæ*, and differeth in many things from the generall law concerning the subject. As for example, the king in any suit for any thing that pertaines to the crown shall not shew in certaine his cosinage as a subject shall do, or as he himselve shall do for things touching his dutchie. [n] And in the case of the king, if he hath issue a sonne and a daughter by one venter, and a sonne by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands, nor any other fee simple lands of the crowne, but the yonger brother shall have them. Wherein note that neither *possessio fratris* doth hold of lands of the possessions of the crowne, nor halfe blood is no impediment to the descent of the lands of the crowne, as it fell out in experience after the decease of king *Edward* the sixt to the queene *Mary*, and from queene *Mary* to queene *Elizabeth*, both which were of the half blood, and yet inherited not onely the lands which king *Edward* or queen *Mary* purchased, but the ancient lands parcell of the crowne also. 6. H. 4. 1. [n] 34. H. 6. fol. 34. Pl. Com. fol. 245. 25. E. 3. ca. de natis ultra mare. (4. Inst. 206.)

A man, that is king by descent of the part of his mother, purchases lands to him and his heires, and dies without issue, this land shall descend to the heire of the part of the mother; but in the case of a subject, the heire of the part of the father shall have them. Pl. Com. ubi supra.

So king *Henry* the eight purchased lands to him and his heires, and died having issue two daughters, the lady *Mary*, and the lady *Elizabeth*; after the decease of king *Edward*, the eldest daughter queen *Mary* did inherit only all his lands in fee simple. For the eldest daughter or sister of a king shall inherit all his fee simple lands. So it is if the king purchaseth lands of the custome of gavelkind, and die having issue divers sonnes, the eldest sonne shall only inherit these lands (4). And the reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alter the descent, so as all the lands and possessions whereof the king is seised in *jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crowne, and therefore to whomsoever the crowne descend, those lands and possessions descend also, for the crowne and the lands whereof the king is seised in *jure coronæ*, are *concomitantia*. If the right heire of the crowne be attainted of treason, yet shall the crowne descend to him, and *eo instante* (without any other reversall) the attainder is utterly avoided, as it fell out in the case of *Henry* the seventh (1). [o] And if the king purchase lands to him and his heires, he is seised thereof in *jure coronæ*; à fortiori, when he purchases land to him his heires and successors (2). (7. Co. 12. b. Calvin's case.) Pl. Com. fol. 247. (1. Sid. 138.) Pl. Com. 238. 1. H. 7. fol. 42 (Plowd. 105. 244, 245.) [o] 43. E. 3. fol. 20.

But hereof this little taste shall suffice.

(3) [See Note 86.]

(4) [See Note 87.]

(1) [See Note 88.]

(2) [See Note 89.]

Sect. 9.

E*T est aſcavoir, que ce parol (enheritance) n'eſt pas tant ſolement entendue lou home ad terres ou tene-ments per diſcent d'enheritage, mes auxi cheſcun fee ſimple ou taile (3) que home ad per ſon purchaſe puit eſtre dit enheritance, pur ceo que ſes heyres luy purront enheriter. Car en brieſe de droit que home portera de terre que fuit de ſon purchaſe demefne, le brieſe dirra, quam clamat eſſe juſ et hæreditatem ſuam. Et iſſint ſerra dit en divers auters brieſs queux home ou feme portea de ſon purchaſe demefne; come apiert per le Regiſt.*

A*ND* it is to wit, that this word (*inheritance*) is not onely intended where a man hath lands or teneiments by deſcent of inheritance, but alſo every fee ſimple or taile which a man hath by his purchaſe may be ſaid an inheritance, becauſe his heires may inherit him. For in a writ of right which a man bringeth of land that was of his owne purchaſe, the writ ſhall ſay, *quam clamat eſſe juſ et hæreditatem ſuam*. And ſo ſhall it be ſaid in divers other writs which a man or woman bringeth of his owne purchaſe, as appeares by the Re-giſter.

Sect. 45, 46. 57.
59. 86. 100.
146. 164. 170.
184. 229. 243.
259. 274. 280.
293. 306. 305.
419. 420. 421.
489. 632. 697.
749.

[a] Sect. 732.
Bract. lib. 2.
fo 62. b. Fleta
lib. 6. cap. 1.
(Poſt. 383. b.)
[b] Regiſt.
fol. 1, 2.
(F. N. Br. 193.)
Regiſt. fo 4.
232. 49. E. 3. 22.
7. H. 4. 5.
10. H. 6. 9.
39. H. 6. 38.
6. E. 3. 30. Pl.
Com. Wim-
beſhe's caſe, 47.
& 53. b.
6. E. 3. 30.

“**E***T est aſcavoir.*” This kinde of ſpeech is uſed twice in this Chapter, and oftentimes by our authour in all his three bookes, and ever teacheth us ſome rule of law, or generall or ſure leading point, as you ſhall perceive by reading, and obſerving of the ſame, which for the eaſe of the ſtudioſus reader I have obſerved.

“*Quam clamat eſſe juſ et hæreditatem ſuam.*” [a] Here our authour declareth the right ſignification of this word (*inheritance*). And true it is that in the writ of right patent, &c. *quando dominus remittit curiam ſuam*, the words of the writ be, *quam clamat eſſe juſ et hæreditatem ſuam*. And in the *præcipe in capite*, in a *cui in vitâ*, [b] when the defendant claimeth by purchaſe, the writ is, *quam clamat eſſe juſ et hæreditatem ſuam*. And with Littleton agreeth the Regiſter, fol. 4. & 232. and the booke in 49. E. 3. 22. againſt ſodaine opinions 7. H. 4. 5. 10. H. 6. 9. 39. H. 6. 38. Pl. Com. *Wimbeſhe's caſe* 47. And yet in 7. H. 4. 5. which is the booke of the greateſt weight, ſir *William Thirning* chiefe juſtice of the common bench (as it ſeemeth doubting of it) went into the chancery to enquire of the chancery men the forme of the writ in that caſe; and they ſaid that the forme was both the one way and the other, ſo as thereby the opinion of Littleton is confirmed, and the booke in 6. E. 3. fo. 30. is notable; for there in an action of waſte the plaintife ſuppoſed, that the defendant did hold *de hæreditate ſua*, and it is ruled, that albeit the plaintife purchaſed the reversion, yet the writ ſhould ſerve. And there it is ſaid, it hath beene ſeene, that in a *cui in vitâ*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchaſe. And ſo this point wherein there might ſeem ſome contrariety in bookes

is

{3} ou taile, not in L. and M.

is manifestly cleared. But in the statute of W. 2. cap. 5. *de hereditate uxorum* by construction of the whole statute is taken onely for the wives inheritance by descent, and not by purchase, as appeareth in 1. E. 2. tit. *Quare impet.* 43. 35. H. 6. 54. F. N. B. 34. b.

[16. b.] There be some that have an inheritance [c], and have it neither by descent, nor properly by purchase, but by creation; as when the king doth create any man a duke, a marquesse, earle, viscount, or baron to him and his heires, or to the heires males of his bodie, &c. he hath an inheritance therein by creation. A man may have an inheritance in title of nobilitie and dignitie three manner of wayes, that is to say, by creation, by descent, and by prescription (1). By creation two manner of ordinary wayes (for I will not speake of a creation by parliament) by writ, and by letters patent. Creation by writ is the ancienter way; and here it is to be observed, that a man shall gain an inheritance by writ (2). King Richard the second created *John Beauchampe de Holte* baron of *Kederminster* by his letters patents, bearing date the 10th October, anno regni sui 11. before whom there was never any baron created by letters patent, but by writ. And it is to be observed, that if he be generally called by writ to the parliament, he hath a fee simple in the baronie without any words of inheritance. But if he be created by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. If a man be called by writ to the parliament, and the writ is delivered unto him, and he dieth before he cometh and sits in parliament, whether he was a baron or no? And it is to be answered that he was no baron, for the direction and deliverie of the writ to him maketh not him noble; for the better understanding whereof it is to be knowne that the words of the writ in that case are, *Rex, &c. E. B. de D. Chivalier salutem. Quia de advisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Angliæ, &c. concernentibus, quoddam parlamentum nostrum apud civitatem Westm. à 21 Octob. proxim. futuro teneri ordinavimus, et ibid. vobiscum et cum prælatis, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum, vobis in fide et ligeanciâ quibus nobis tenemini firmiter injungendo mandamus, quod consideratis dictorum negotiorum arduitate et periculis imminetibus, cessante excusatione quâcunque, dictis die et loco personaliter interfitis nobiscum et cum prælatis, magnatibus, et proceribus supradictis, super dictis negotiis tractatur vestrumque consilium impensur', &c.* And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. [d] And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tryed by jury, but by the record of parliament, which could not appeare unlesse he were of the parliament (3). Therefore a duke, earle, &c. of another kingdome, are not to be sued by those names here, for that they are not peeres of our parliament (4). And albeit the creation by writ is the ancienter,

W. 2. ca. 5.
1. E. 2. tit.
quare impet. 43.
35. H. 6. 54.
F. N. B. 34. b.

[c] 6. Co. 52, 53.
Countes de
Rutland's case.
8. Co. 16, 17.
the Prince's case.
(4. Inst. 126.)

(12. Co. 69.
ante 9. b.)

6. Co. 52, 53.
Countesse of
Rutland's case.
8. H. 6. 10.
48. E. 3. 30.
35 H. 6. 46.
Pl. Com. 223.
[d] 35. H. 6. 46.
48. E. 3. 30. l.
48. Ass. p. 6.
22. Ass. p. 24.
Regist. 287.
11. E. 3. breve
472. 20. E. 4. 6.

(1) See 1. Bulstr. 196. where the earldom of Arundel is mentioned as an instance of an earldom by prescription. In this case many

curious particulars concerning the honour of *Petworth* are mentioned.

(2) [See Note 90.]

(3) [See Note 91.]

(4) [See Note 92.]

Lib. 1. Cap. 1. Of Fee simple. Sect. 9.

(6. Co. 52.
Countess of Rut-
land's case.)

ancienter, yet the creation by letters patent is the surer, for he may be sufficiently created by letters patents, and made noble, albeit he never sit in parliament.

[e] 6 Co. 52, 53.
Countess de Rut-
land's case.

[e] And it is to be observed, that nobilitie may be granted for term of life, by act in law without any actuall creation; as if a duke take a wife, by the intermarriage she is a duchess in law, and so of a marquess, an earle, and the rest, and in some other cases. And there is a diversitie betweene a woman that is noble by descent, and a woman that is noble by marriage. [f] For if a woman, that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still (5); but if she gaine it by marriage, she loseth it if she marry under the degree of nobilitie; and so is the rule to be understood, *Si mulier nobilis nupsit ignobili desinit esse nobilis*. [g] But if a dutchesse by marriage marieth a baron of the realme, she remaineth a dutchesse and loseth not her name, because her husband is noble (6), *et sic de cæteris*.

2. H. 6. 11.
22. Aff. 24.
12. E. 3. breve
254. 8. H. 4. 19.
11. H. 4. 15.
Vide Fleta lib 6.
ca. 10.

[f] 4. Co. 118.
Acton's case,
tempore Mariæ
Reginæ. Brooke
notme de dignity
19. 14. H. 6. 18.
2 H. 6. 11.

And as an estate for life may be gained by marriage, so may the king create either man or woman noble for (7) life [h] but not for yeares, because then it might goe to executors or administrators (8). The true division of persons is, that everie man is either of nobilitie, that is, a lord of parliament of the upper house, or under the degree of nobilitie, amongst the commons, as knights, esquires, citizens and burgeses of the lower house of parliament, commonly called the house of commons; and he that is not of the nobilitie is by intendment of law among the commons (9).

[g] 22. H. 6. 52.
[h] 9. Co. 97.
98. Sir Geo. 2.
Reynel's case.

“Come appiert per le Register.” Which booke in the statute of W. 2. ca. 24. is called *Registrum de cancellariâ*, because it containeth the formes of writs at the common law that issue out of the chancerie, *tanquam ex officinâ justitiæ*. There is a register of originall writs, and a register of judiciall writs; but when it is spoken generally of the register, it is meant of the register originall. For the antiquitie and excellencie of this booke, see in my preface to the eight part of my Commentaries. This excellent booke our author voucheth divers times in these bookes, and so doth he divers other authorities in law of several kinds, but with this observation, that he citeth no authoritie but when the case is rare, or may seeme doubtfull, which appeareth in this, that he putteth no case in all his three bookes but hath warrant of good authoritie in law. For he knew well the rule, that *perspicua vera non sunt probanda*. And the like observation is made of Justice Fitzherbert in his booke of *natura brevium*, that he never citeth authoritie, but when the case is rare or was doubtfull to him. The authorities which our author hath cited in his three bookes I have collected.

Vide Sect. 88.
94. 96. 101. 157.
234. 318. 383.
412. 420. 433.
514. 643. 644.
657. 660. 692.
702. 729.

(5) See 14. H. 8. 42. Dy. 79.

(6) [See Note 93.]

(7) [See Note 94.]

(8) [See Note 95.]

(9) See 2. Init. 29. 50.

[17. a.]

Sect. 10.

ET de tielx choses, de queux home poit aver un manuel occupation, possession ou reseit, sicome des terres tenements rents et hujusmodi, la home dirra en count countant et en plea-
 pledant, que un tiel fuit seise en son demesne come de fee. Mes de tiels choses, que ne gisent en tiel manuel occupation, &c. sicome de advowson d'esglise et hujusmodi, la il dirra, que il fuit seise come de fee, et nemy en son demesne come de fee. Et en Latin il est en l'un cas, quod talis feistus fuit, &c. in dominico suo ut de feodo, et en l'auter case quod talis feistus fuit, &c. ut de feodo.

AND of such things, whereof a man may have a manuall occupation, possession or receipt, as of lands, tenements, rents, and such like, there a man shall say in his count countant and plea pleadant, that such a one was seised in his demesne as of fee. But of such things, which do not lie in such manuall occupation, &c. as of an advowson of a church and such like, there he shall say, that he was seised as of fee, and not in his demesne as of fee. And in Latine it is in one case, quod talis feistus fuit in dominico suo ut de feodo, and in the other case, quod talis feistus fuit, &c. ut de feodo.

“**E**N count countant.” Count, i. e. *narratio*, cometh of the French (Doctr. Pla. 83.) word, *conte*, which in *Latyne* is *narratio*, and is vulgarly called a declaration (1). The original writ is according to its name *breve*, briefe and short; but the count, which the plaintife or demandant makes, is more narrative and spacious and certaine both in matter and in circumstance of time and place, to the end the defendant may be compelled to make a more direct answer; so as the writ may be compared to *logicke*, and the count to *rhetorick*; and it is that which the civilians call a *libell*. And in that ancient booke of the Mirror of Justices, lib. 2. cap. des loiers, *contors* are *serjeant's* skilfull in law, so named of the count as of the principal part, and in W. 2. ca. 29. he is called *serjeant counter* (2).

Mirror des
Justices.

W. 2. cap. 29.

“**E**n plea pleadant.” *Placitum*. Here Littleton teacheth good pleading in this point, of which in his Third Booke and Chapter of Confirmation, Sect. 534. he thus saith, *Et saches mon firs, que est un des plus honorables laudables et profitables choses en nostre ley, de aver le science du bien pleader en actions reals et personels; et pur ceo, jeo toy counsaile especialment de metter ton courage et cure de ceo apprender.* And for this cause this word *placitum* is derived à *placendo*, quia bene placitare super omnia placet; and it is not, as some have said, so called per antiphrasin, quia non placet.

“**S**eise,” *Seisitus*, commeth of the French word *seisin*, i. e. *possessio*, saving that in the common law, *seised* or *seisin* is properly applyed to freehold, and *possessed* or *possession* properly to goods and chattels; although sometime the one is used instead of the other.

Braet. lib. 4.
fol. 263. Idem.
lib. 5. fol. 372.
Britton fol. 205,
206.
Flet. lib. 5. cap. 5.
Stanf. Præf. 8.
Pl. Com. fol. 191.
Wrottesley's case.

“**E**n son demesne come de fee, in dominico suo ut in feodo.” *Dominicum* is not onely that inheritance, wherein a man hath proper dominion

(1) [See Note 96.]

(2) [See Note 97.]

dominion or ownership, as it is distinguished from the lands which another doth hold of him in service, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and favoureth *de domo*, of the house, either *ad mensam*, for his or their board and sustentation, or is manually received, (as rents) for bearing and defraying of necessary charges publike or private. Of these, saith our author, he should plead, that he is seised *in dominico suo ut de feodo*, i. e. *de feodo dominicali, seu terrâ dominicali, seu redditu dominicali*; which is as much as to say demeyne or demaine, of the hand, i. e. manured by the hand, or received by the hand; and therefore he calleth it manuell occupation, possession or receipt (3). And in *Domesday* demeane land is called inland; as for example, 4 *bovatas terræ de inland*, et 10 *bovatas in servitio*.

Domesday.

“*En tiel manuell occupation, &c.*” There is nothing in our author but is worthy of observation. Here is the first (&c.) and there is no (&c.) in all his three bookes (there being as you shall perceive very many), but it is for two purposes. First, it doth imply some other necessary matter. Secondly, that the student may, together with that which our author hath said, inquire what authorities there be in law that treat of that matter, which will worke three notable effects: first, it will make him understand our author the better: secondly, it will exceedingly adde to the reader’s invention: and lastly, it will fasten the matter more surely in his memory; for which purpose I have for his ease in the beginning set downe, in these Institutes, the effect of some of the principal authorities in law as I conceive them concerning the same. In this place the (&c.) implyeth possession or receipt, and such other matter as appeareth by my notes in this Section. As for the authorities of law, you shall find the effect of them in this Section, and the like of the rest of the (&c.) which you shall find in the Sections hereafter mentioned, omitting those (for avoyding of tediousnesse) that either are apparent, or which are explained in some other places, viz. Sect. 20. 48. 102. 108. 120. 125. 136. 137. 146. 149. 154. 164. 166. 167. 168. 177. 179. 183. 184. 194. 200. 202. 210. 211. 217. 220. 226. 233. 240. 242. 244. 245. 248. 262. 264. 269. 270. 271. 279. 320. 322. 323. 325. 326. 327. 329. 330. 335. 336. 341. 347. 348. 349. 350. 352. 355. 356. 359. 364. 365. 374. 375. 377. 381. 384. 389. 393. 395. 397. 399. 401. 402. 410. 417. 428. 433. 447. 449. 464. 470. 471. 477. 483. 489. 500. 501. 522. 532. 552. 553. 556. 558. 562. 578. 591. 592. 593. 594. 603. 613. 624. 625. 630. 632. 634. 637. 638. 648. 659. 660. 661. 669. 687. 693. 700. 718. 745. 748. 749. All which I have observed and quoted here once for all, for the ease of the studious reader (1).

[17. b.]

Britton 205, 206.
optimè. Fleta lib.
6. cap. 5
Idem. lib. 3.
cap. 15.

“*Ut de feodo.*” Where (*ut*) is not by way of similitude, but to be understood positively that he is seised in fee. And so it is where one pleads a descent to one *ut filio et hæredi*, that is, to

10.

(3) [See Note 98.]

(1) See in fol. 22. a. the note in respect

to lord Coke’s observation on Littleton’s use of *nota*, &c. and like expressions.

10. S. that is sonne and heyre, et sic de cæteris, where (ut) denotat ipsam veritatem.

“*Sicome de advowson.*” Of an advowson [i] wherein a man hath as absolute ownership and propertie as he hath in lands or rents, yet he shall not pleade that he is seised in *dominico suo ut de feodo* (2), because that inheritance, favouring not *de domo*, cannot either serve for the sustentation of him and his household, nor any thing can be received for the same for defraying of charges. And therefore he cannot say, that he is seised thereof in *dominico suo de feodo*, whereby it appeareth how the common law doth detest simony and all corrupt bargaines for presentations to any benefice, but that [k] *idonea persona* for the discharge of the cure should be presented freely without expectation of any thing: nay, so cautious is the common law in this point, that the pl. in a *quare impedit* should recover no damages for the losse of his presentation untill the statute of *W. 2. cap. 5.* (3) And that is the reason that gardian in socage [l] shall not present to an advowson, because he can take nothing for it, and by consequent he cannot account for it. And by the law he can meddle with nothing that he cannot account for. [m] And in a writ of right of advowson, the patron shall not alledge the explees or taking of the profits in himselfe but in his incumbent. And hereby the old bookes shall be the better understood, viz. *Bracton*, lib. 4. tract. 3. cap. nu. 5. *Est autem dominicum, quod quis habet ad mensam, et propriè, sicut sunt Boordlands Anglicè.* And *Fleta*, lib. 5. ca. 5. *Est autem dominicum propriè terra ad mensam assignata. Dominicum etiam dicitur ad differentiam ejus quod tenetur in servitio.* But of an advowson and such like he shall plead, that he is seised *de advocatione ut de feodo et jure* (4).

“*Advowson.*” *Advocatio*, signifying an advowing or taking into protection, is as much as *jus patronatus*. Sir William Herle in 7. E. 3. fol. 4. saith, that it is not long past, that a man did know what an advowson was; but when a man would grant an advowson, he granted *ecclesiam* the church, and thereby the advowson passed. *Vide* 45. E. 3. 5. But surely the word is of greater antiquity; for in the Register there is an originall writ *de recto advocationis*, and in the originall writ of assise *de darreine presentment* the patron is called *advocatus*. [n] *Vide* *W. 2. ca. 5.* And so doth [o] *Bracton* call him. *Advocatus autem dici poterit ille, ad quem pertinet jus advocationis alicujus, ut ad ecclesiam præsentet nomine proprio et non alieno.* And [p] *Fleta* lib. 5. cap. 14. agreeth herewith almost *totidem verbis*: *Advocatus est ad quem pertinet jus advocationis alterius ecclesiæ, ut ad ecclesiam nomine proprio non alieno possit præsentare.* And [q] *Britton* cap. 92. the patron is called *avow*, and the patrons are called *advocati*, for that they be either founders or maintainers or benefactors of the church either by building dotation or increasing of it, in which respect they were also called *patroni*, and the advowson *jus patronatus*.

And

(2) [See Note 99.]

(4) [See Note 101.]

(3) [See Note 100.]

[r] 33. H. 6. 11. And it is to be understood that there is a great [r] diversity
 b. per Prifot. *inter ad-vocationem medietatis ecclesiæ, &c. et medietatem ad-vocationis*
 14. H. 6. 15. *ecclesiæ* (5), and of their severall remedies for the same. For the
 per Newton. advowson of the moiety is, when there be severall patrons and two
 31. E. 1. droit severall incumbents in one church, the one of the one moiety thereof,
 68, 69. F. N. B. and the other of the other moiety, and one part as well of the church
 31. b. 10. Co. as of the towne allotted to the one, and the other part thereof to
 135, 136. the other; and in that case each patron if he be disturbed shall have
 R. Smithe's case. a *quare impedit, quod permittat ipsum præsentare idoneam personam ad*
 45. E. 3. *medietatem ecclesiæ* (1).
 Fines 41. 17. E. 3. 78.
 27. E. 2. Dower 163. (4. Co. 75. 5. Co. 102. 2. Inst. 375.)

[18. a.]

(10. Co. 235. But if there be two coparceners, and they do agree to present by
 F. N. B. 33.) turne, each of them in truth hath but a moiety of the church; but
 for that there is but one incumbent, if either of them be disturbed,
 she shall have a *quare impedit, &c. præsentare idoneam personam ad*
 [s] Britton, *ecclesiam*, for that there is but one church and one incumbent, and
 fo. 235. so of the like (2). But in [s] the said case of two coparceners, one
 51. E. 1. of them shall have a writ of right of advowson *de medietate advo-*
 droit 68, 69. *cationis*; for in truth she hath but a right to a moiety: but in the
 F. N. B. 31. b. other case, where there be two patrons and two incumbents in one
 & 33. a. church, each of them shall have a writ of right of advowson *de advo-*
 5. H. 7. 8. *catione medietatis*.
 37. E. 3. 38.
 75, 76. 7. E. 3. 327. 8. E. 3. 425. 22. Aff. p. 33. 14. H. 4. 10. 33. E. 3. quar. imp. 196.

And as there may (as hath beene said) be two severall parsons
 in one church, so there may be two that may make but one parson
 in a church. [t] Britton saith, *si ascun eglise soit done a divers*
 [t] Britton, *persons per un sole avowe, nul ne se pura pleadre per assise de juris*
 fo. 235. *utrum ne nul estre implede sans l'autre, &c.* And therewith agreeth
 [u] Fleta, lib. 5. *Fleta. [u] Item licet aliqua ecclesia divisa fuerit inter duos, si ve bona*
 ca. 19. *sua habeant communia si ve separata, dum tamen unicum habeant ad-*
 F. N. B. 49. o. *vocatam, nullus eorum sine alio agere poterit vel implacitari.* And
 Fitzb. saith, that two prebendaries may be one parson of a church,
 who shall joyne in a *juris utrum*, so as one rectory may be annexed
 to two severall prebends, and both of them make but one parson.
 But where one is parson of the one moiety of a church and another of
 the other moiety, as hath been said, there one of them shall have a
 F. N. B. 49. p. *juris utrum* against the other, and in the writ shall name him *persona*
medietatis ecclesiæ, &c. But for avoyding of suspicion of curiositie
 if we should proceed any further herein, we will attend what Littleton
 will further teach us.

Sect. 11.

ET nota, que home ne poit aver
 plus ample ou plus greinder estate
 d'enheritance (3) que fee simple. **A**ND note, that a man cannot have
 a more large or greater estate of
 inheritance than fee simple.

THIS

(5) [See Note 102.] Advowf. 21. 2. Leon. 36. Dy. 78. b. &
 299. W. Jo. 446. & Willf. vol. 2. p. 225.
 [18. a.] & 231.
 (1) [See Note 103.] (3) On inheritance, L. and M. Roh. P.
 (2) See further on this subject Doder. and Red.

THIS doth extend as well to fee simples conditional and qualified, as to fee simples pure and absolute. For our author speaketh here of the amplenesse and greatnesse of the estate, and not of the perdurableness of the same. And he, that hath a fee simple conditionall or qualified, hath as ample and great an estate, as he that hath a fee simple absolute; so as the diversity appeareth betweene the quantity and quality of the estate.

From this state in fee simple, estates in taile and all other particular estates are derived; and therefore worthily our author beginneth his First Booke with tenant in fee simple, for *à principalioribus seu dignioribus est inchoandum*.

“*Ne poit aver plus ample ou greinder estate, &c.*” For this cause two [a] fee simples absolute cannot be of one and the selfe-same land. If the king make a gift in taile, and the donee is attainted of treason, in this case the king hath not two fee simples in him, viz. the ancient reversion in fee, and a fee simple determinable upon the dying without issue of tenant in taile, but both of them are consolidated and conjoined together (4). And so it is, if such a tenant in taile doth convey the land to the king his heires and successors, the king hath but one estate in fee simple united in him, and the king's grant of one estate is good, and so was it adjudged in the Court of Common Pleas. And yet in several persons by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto*; as if a gift in taile be made to a villeine, and the lord enter, the lord hath a fee simple qualified, and the donor a reversion in fee (5). But if the lord infeoffe the donor, now both fee simples are united, and he hath but one fee simple in him. But one fee simple cannot depend upon another by the grant of the partie; as if lands be given to A. (6), so long as B. hath heires of his body, the remainder over in fee, the remainder is voyde (7).

[a] Pl. Com. 349. and 248. 19. H. 8. Dier 4. 29. H. 8. Dier 33. 16. Eliz. Dier 330. 2. Marie Dier 107. Aulten's case. Pa. 38. Eliz. rot. 108. in Quar. Imp. betweene the Queene Pl. and the Bishop of Lincolne Hufley and others Deff. 15. E. 4. 6. 8. (Plowd. 559. Dy. 4. & 12. Cro. Jam. 590. Finch. 8vo. ed. 113. 1. Ro. Abr. 827. Dy. 156. b.)

Sect. 12.

ITEM, *purchase est appel la possession de terres ou tenemens que home ad per son fait ou per agreement, a quel possession il ne avient per title de discent de nul de ses ancesters, ou de ses cousins, mes per son fait aemesne.*

AL SO, purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he commeth not by title of descent from any of his ancestors, or of his cousins, but by his owne deed.

PURCHASE in Latin is either *acquisitum*, of the verbe *acquirō*, for so I finde it in the original Register 234. *In terris vel tenementis, quæ viri et mulieres conjunctim acquisiverunt, &c.* Bracton calleth it *perquisitum*; and by [b] Glanvill it is called *quæstus* or *perquisitum*.

A purchase is alwayes intended by title, and most properly by some kinde of conveyance either for money or some other consideration,

Bracton lib. 2. fol. 65. [b] Glanvill. lib. 7. cap. 1. Brit. c. 33. fo. 84. & 121. (1. Ro. Abr. 827.)

(4) [See Note 104.]

(5) See acc. post. 117. a.

(6) The words *and his heires* seem wanting here.

(7) Acc. 10. Co. 97. b. See an observation on this doctrine by lord ch. justice Vaughan, who seems to question it. Vaughn. 269, 270.

ration, or freely of gift; for that is in law also a purchase (1). But a descent, because it commeth meerely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament in 1 H. 5. ca. 5. speake of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith (2). Like law of the state of tenant by the curtesie, tenant in dower, or the like. But such as attaine to lands by meere injury or wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than robbery, burglary, piracy, or the like, can justly be termed purchase (3).

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat armor and pennons with his armes, and such other insignes of honour as belong to his degree or order, set up in the church, or if a gravestone or tombe be laid or made, &c. for a monument of him, [c] in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heire and his heires in the honour and memory of whose ancestor they were set up (4). And so it was holden *Mich. 10. Ja.* and herewith agree the lawes [d] in other countries. Note this kind of inheritance. And some hold that the wife or executors that first set them up, may have an action in that case against those that deface them in their time (5). And note, that in some places chattels as heire-loomes (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire (6), and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heire-loome is due by custome and not by the common law (7). And the [e] ancient jewels of the crowne are heire-loomes, and shall descend to the next successor, and are not devisable by testament. An heire-loome is called *principalium* or *hereditarium*.

Consuetudo hundredi de Stretford in Com' Oxon' est, quod hæredes tenementorum infra hundredum prædictum existentium post mortem antecessorum suorum habebunt, &c. principalium, Anglice, an heire-loome, viz. de quodam genere catallorum, utensilium, &c. optimum plaustrum, optimam carucam, optimum ciphum, &c.

Our author hath not spoken of parceners in this Chapter, for that he hath particuler Chapters of the same.

Gradus Parentelæ, &c.

(1) [See Note 105.]

(2) [See Note 106.]

(3) See acc. ante. 3. b.

(4) See Cro. Jam. 367. 2. Bullstr. 151. See too the several books cited in Vin. Abr. Descent E.

(5) [See Note 107.]

(6) [See Note 108.]

(7) [See Note 109.]

TENANT in fee taile est per force de le statute de West. 2. cap.

1. car devant le dit statute, tous enheritances fueront fee simple; car tous les dones que sont spécifiés deins mesme le statute fueront fee simple conditional al common ley, come appiert per le rehearsal de mesme le statute. Et ore per cel statute tenant en le taile est en deux maners, c'est à sçavoir, tenant en taile generall, et tenant en taile special.

TENANT in fee taile is by force of the statute of W. 2. cap.

1. for before the said statute, all inheritances were fee simple; for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall, and tenant in taile speciall.

“**T**ENANT en fee taile.” *Tallium, or feodum talliatum, is derived of the French word tailler, scindere; for so Littleton himselfe in this Chapter, Sect. 18. saith.*

(2. Inst. 331.)
Mirror, cap. 2.
sect. 15. & cap. 1.
sect. 5.
(Post. 22. a.)

[19. a.] “*Le Statute de W. 2.*” This statute was made in 13. E. 1. and is called *West. 2.* because the parliament was holden at *Westminster*, and hath the name of the second, because another parliament was formerly holden at *Westminster* in the third year of the same king's raigne, which was called *Westminster* the first. And albeit manie parliaments were after holden at *Westminster* besides these, yet were they two onely, *propter excellentiam*, called the statutes of *Westminster*. And the act intended by *Littleton* is *W. 2. ca. 1.* upon which statute our author in the *Inner Temple* did learnedly read, whose reading I have. Of king *Ed. 1.* and of this statute, sir *William Herle*, chiefe justice of the court of common pleas, in 5. E. 3. 14. saith, that king *E. 1.* was the wisest king that ever was: and the cause of the making of this statute was to preserve the inheritance in the blood of them to whom the gift was made. And in 9. E. 3. 22. he saith, that they were sage men that made this statute (1). See more of this in the Chapter of Warranties, Sect. 746.

(2. Inst. 331.)

5. E. 3. 14.

9. E. 3. 22.

Of this estate taile it is said, [a] *Modus legem dat donationi, et tenenda est etiam conventio, quia modus et conventio vincunt legem: ut si alicui cum uxore fiat donatio, habendum et tenendum sibi et hæredibus quos inter eis legitimè procreabunt, ecce quòd donator vult tales hæredes in hæreditate paternâ et maternâ succedant, aliis hæredibus eorum remotioribus penitus exclusis: et quòd voluntas donatoris observari debet, manifestè apparet per hæc statuta. Quia autem dudum regi durum videbatur, &c.*

[a] *Fleta lib. 3. cap. 9.*
Braçt. lib. 2. cap. 5, &c.
Brit. ca. 24. & 36.

“*Devant le dit statute [b] tous enheritances fueront fee simple.*” Here fee simple is taken in his large sense, including as well conditionall or qualified, as absolute, to distinguish them from estates in taile since the said statute. Before which statute of *donis conditionalibus*, if land had beene given to a man, and to the heires males

[b] *Vid. Sect. 18. Brit. ca. 36. fol. 93. Pl. Com. 235. 562. Shelley's case. 1. Co. 103. (2. Inst. 333. of 7. Co. 38.)*

(1) However lord Coke in other places finds great fault with the statute *de donis*. See post. 19. b.

[c] 44. E. 3. 3.
30. E. 1. Form-
don 66.
7. E. 3. 6, 7.
7. H. 4. 31.
12. H. 4. 2.

[d] 18. E. 3. 46.
18. Aff. p. 5.
12. E. 4. 3.

[f] 4. H. 3.
Formdon 34.
18. Aff. 5.
12. E. 4. 3.
Pl. Com. 247. b.
18. E. 2. tit.
Formdon 58, 59.

of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and dyed, and the issue male had inherited, yet he had not had a fee simple absolute; [c] for if he had died without issue male, the donor should have entred as in his reverter. By having of issue, the condition was performed for three purposes: First, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue (2): for if the donee had issue and died, and the land had descended to his issue, [d] yet if that issue had dyed (without any alienation made) without issue, his collaterall heire should not have inherited, because he was not within the forme of the gift, viz. heire of the body of the donee. [f] Lands were given before the statute in frank-marriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collaterall issue should not inherite, but the donor shall re-enter. So note, that the heire in taile had no fee simple absolute at the common law, though there were divers descents (3).

If lands had beene given to a man and to his heires males of his bodie, and he had issue two sonnes, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger sonne *per formam doni*. And so if land had beene given at the common law to a man and the heires females of his body, and he had issue a sonne and a daughter, and died, the daughter should have inherited this fee simple at the common law (4); for the statute of *donis conditionalibus* createth no estate taile, but of such an estate as was fee simple at the common law, and is descendable in such forme as it was at the common law. If the donee in taile had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law having no issue at that time, had not barred the donor.

(1. Ro. Abr.
840.)

[g] 30. E. 1.
Formdon 5.
Temps E. 1.
ibidem 62.
19. E. 2.
Formdon 61.
Pl. Com. 246.
[b] 4. E. 2.
Formdon 50.

[g] If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor. [b] But if feme tenant in taile had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formdon in descender* (5); for the alienation was not lawful: but otherwise it is, if it had beene by fine. And these things, though they seem ancient, are necessarie notwithstanding to be knowne, as well for the knowledge of the common law, as for annuities and such like inheritances, as cannot be intailed within the said statute, and therefore remaine at the common law. [i] If the king before the statute of *donis conditionalibus* had made a gift to a man, and to the heires of his bodie begotten, the donee *post prolem suscitatum* might have aliened as well as in the case of a common person. [k] But if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assents;

(1. Ro. Abr.
837.)

[i] 6. E. 3. 56.
Jo. of Eltham's
case.

[k] 45. Aff. p. 6.

[19. b.]

(2) [See Note 110.]

(4) [See Note 112.]

(3) [See Note 111.]

(5) [See Note 113.]

affets; but otherwise it was in the case of a common person (1). [1] Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him; and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasors ~~sure of their purchases, farmers of their leases, creditors of their debts,~~ the king and lords had their escheats, forfeitures, wardships and other profits of their feignories: and for these and other like cases, by the wisdom of the common law all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daillie experience teacheth us (2). But see more of this matter in the afore-said Chapter of Warrantie, Sect. 746.

[1] Pl. Com.
246. b.
(Post. 392. 370.
b.)

10. Co. 38. in
Port. case.

“Common ley.” See for explication hereof, Sect. 170.

“Come appiert per le rehearsall de mesme le statute.” Here, by the authoritie of our author, the rehearsall or preamble of a statute is to be taken for truth; for it cannot be thought, that a statute, that is made by authoritie of the whole realme, as well of the king, as of the lords spirituall and temporall, and of all the commons, will recite a thing against the truth.

Doct. and Stud.
lib. 2. ca. 55.

“Et ore per cel statute tenant en taile est en 2. manners; scil. tenant en taile generall, et tenant en taile especiall.”

This division of an estate taile is perfect and sound; for the *membra dividenda*, viz. generall and speciall, are converted properly with the thing defined, and they are proved by many authorities of law, and approved of all learned men, and so are all the divisions through all his three bookes, which the studious and diligent reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

By this statute the land is as it were appropriated to the tenant in taile, and to the heires of his body; and therefore [r] if an estate be made, either before or since the statute of 27. H. 8. cap. 10. to a man and the heires of his bodie, either to the use of another and his heires, or to the use of himselfe and his heires, this limitation of use is utterly voyde. For before the said statute of 27. H. 8. he could not have executed the estate to the use; and so was it adjudged [s] in an *ejedione firmæ* between John Cowper, plaintife, and Thomas Franklin, &c. defendant (3).

(Plowd. 555.
2. Ro. Abr. 780.)
[r] 24. H. 8.
tit. feoffments al
uses 4.
27. H. 8. fo.

[s] Pasch. 14.
Jac. in the king's
bench.

(1) [See Note 114.]

(2) Lord Coke in many other places is very strong in his representation of the inconveniencies produced by the statute de

donis. See post. 370. b. and Mildmay's case 6. Co. 40. a.

(3) [See Note 115.]

Sect. 14, 15.

TENANT en taile generall est, lou terres ou tenements sont dones a un home et a ses heires de son corps engendres. En ceo case est dit generall taile, pur ceo que quelcunque feme, que tiel tenant espousa, (s'il avoit plusors femes, et per chescun de eux il ad issue) uncore chescun de les issues per possibilitie poit enheriter les tenements per force del done; pur ceo que chescun tiel issue est de son corps engendre.

EN mesme le maner est, lou terres ou tenements sont dones a un feme, et a les heires de sa corps issuant; coment que el avoit divers barons, uncore l'issue, que el poet aver per chescun baron, poit enheriter come issue en le taile per force de tiel done; et pur ceo tielx dones sont appellees generall tailes.

TENANT in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives, and by every of them hath issue) yet everie one of these issues by possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

IN the same manner it is, where lands or tenements are given to a woman, and to the heires of her bodie; albeit that she hath divers husbands, yet the issue, which she may have by every husband, may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailes.

Wid. Sect. 1.

"TERRES," terra, in his generall and legall signification, (as hath been said before) includeth not onely all kinde of grounds, as medow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground.

(Ante 6. a.)
[1] 7. E. 3. 363.
18. E. 3. 27.
7. H. 6. 8.
32. H. 6. 28.
5. E. 4. 3.
2. H. 7. 28.
4. H. 7. 9.
1. H. 5.
1. H. 8. fol. 3.
Nevil's case.
10. Co. 33; 34.
Pl. Com. in.
Manxel's case
fol. 2. & 3.
(7. Co. 33.
11. Co. 1.
1. Ro. Abr.
837-8.
10. Co. 87.)
[u] 7. Ad. p. 12.
7. E. 6. 1.
(Fitzh. N. B.
178. f.)

"Tenements," tenementa. This is the only word which the said statute of W. 2. that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exercisable within the same, though they lie not in tenure, therefore all these without question may be intailed. As [1] rents, estovers, commons or other profits whatsoever granted out of land; or uses, offices, dignities which concerne lands or certaine places, may be entailed within the said statute, because all these favour of the realtie. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be intailed, because they favour nothing of the realtie. But examples will illustrate and make this learning cleere.

The writ of assise [u] was *De libero tenemento*, and made his pleint of the office of the fourth part of the serjeant of the common place, and the writ adjudged good; and seeing that a man hath a freehold, *liberum tenementum* in it, by consequent it may be intailed.

The

[20. a.]

The office of the keeping of the church of our lady of *Lincolne* was intailed, and a *formedon* there brought upon that gift of the office by the issue in taile. The [x] office of the marshall of *England* intailed (1). The [y] office of one of the chamberlains of the exchequer intailed. 1. *H.* 7. 28. The office of a forrester-ship intailed. 4. *H.* 7. 10. 9. *E.* 4. 56. b. Charters intailed (2). 19. *H.* 8. 3. Use intailed. Nomination to a benefice intailed.

Also a name of dignitie may be intailed within the statute, [a] as dukes, marquesses, earles, viscounts, barons; because they be named of some countie, mannor, towne, or place (3). If the issue in taile [b] in a *formedon* in the *descender* be barred by a false verdict, his release is no barre to his issue, albeit the action is at the common law.

The like law is of a writ of errour. 3. *Eliz. Dyer* 188. If a gift in taile be made with warrantie, the donee releases the warrantie, this shall not bind the issue in taile; for to all these cases and the like the said statute doth extend.

But if I grant to a man, and to the heires of his body, to be keeper of my hounds, or master of my horse, or to be my faulconer, or such like, with a fee therefore, yet these cannot be intailed within the said statute, for that they be not issuing out of tenements, nor annexed to, or exercisable within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and favour nothing of the realtie. And so it is, if I by my deed for me and my heires grant an annuities to a man, and the heires of his body, for that this only chargeth my person, and concerneth no land, nor favoureth of the realtie (4). In all these cases he hath a fee conditionall, as they were before the statute, and the grantee by his grant or release may barre his heire, as he might have done at the common law, for that in these cases he is not restrained by the said statute (5).

“*Et a ses heires de son corps engendres.*” In gifts in taile these words (*heires*) are as necessary, as in *feoffments* and *grants*; for seeing every estate taile was a fee simple at the common law, and at the common law no fee simple could be in *feoffments* and *grants* without these words (*heires*), and that an estate in fee taile is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words (*heires*), unless it be in case of frankmarriage, as hereafter shall be shewed. And where *Littleton* saith (*heires*), yet (*heire*) in the singular number in a speciall case may create an estate taile, as appeareth by 39. *Aff.* p. 20. hereafter mentioned (1). And yet if a man give lands to *A. et hæredibus de corpore suo*, the remainder to *B. in formâ prædictâ*, this is a good estate taile to *B.* for that *in formâ prædictâ* do include the other. If a man letteth lands to *A.* for life, the remainder to *B.* in taile, the remainder to *C. in formâ prædictâ*, this remainder is void for the incertaintie. But if the remainder had beene, the remainder to *C. in eadem formâ*, this had beene a good estate taile; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man, *et semini suo* or *exitibus vel prolibus de corpore suo*, to a man, and to his seed, or to the issues or children

18. *E.* 3. 27.[x] 5. *E.* 4. 3.10. *E.* 4. 14.[y] 11. *E.* 4. 1.1. *H.* 7. 28.4. *H.* 7. 10.9. *E.* 4. 526.19. *H.* 8. 3.1. *H.* 5. 1.[a] 7. *Co.* 33.34. *Nevil's case.*28. *H.* 6. *Lord**Vesey's case.*(6. *Co.* 7. b.*Post.* 392. b.1. *Sid.* 261.)[b] 14. *Aff.* 2.3. *Eliz. Dyer*

188.

*Pl. Com. in**Manxel's case.*(10. *Co.* 58.1. *Ro. Abr.*

837.)

39. *Aff.* p. 20.20. *H.* 6. 35.5. *H.* 4. 7. b.14. *H.* 4. 15.

(Post. 385. b.

1. *Ro. Abr.* 839.8. *Co.* 57.1. *Co.* 103. b.

Ante 9. b.)

[20. b.]

(1) [See Note 116.]

(2) [See Note 117.]

(3) [See Note 118.]

(4) [See Note 119.]

(5) [See Note 120.]

[20. b.]

(1) See this case post. 22. 2.

(Cro. Eliz. 121.
Ow. 64.
S. C. Mo. 103.)
Vid. Shelley's
case, 1. Co.

(1. Ro. Abr.
337.)

of his body, he hath but an estate for life; for albeit that the statute provideth, that *voluntas donatoris secundum formam in charta doni sui manifestè expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himselfe, as it appeared in his learned reading aforementioned upon this statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitimè procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance (2).

(7. Co. 41.)

[c] 3. E. 3.
tit. Bieve 743.
3. E. 3. tit.
Estates.

[d] 12. H. 4. 2.
[e] 37. H. 6. 15.
[f] 5. H. 5. 6.
(7. Co. 41.)

"*De son corps.*" These words are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of W. 2. putteth hath not these words (*de corpore*) but these words (*hæredibus*) viz. *Cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis*. If lands be given [c] to B. *et hæredibus quos idem B. de primâ uxore suâ legitimè procrearet*, this is a good estate in especiall taile (albeit he hath no wife at that time) without these words (*de corpore*). So it is [d] if lands be given to a man, and to his heires which he shall beget of his wife, [e] or to a man *et hæredibus de carne suâ*, or to a [f] man *et hæredibus de se*. In all these cases these be good estates in taile, and yet these words *de corpore* are omitted.

[g] 12. H. 4. 2.
per Horton.
(Post. 27. a.
26. b. 220. a.)

It is holden [g] by some opinions, that if there be grandfather father and sonne, and lands are given to the grandfather, and to his heires begotten by the father, the father dyeth, the grandfather dyeth, the sonne is in as heire to the grandfather begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed. But certaine it is, that in some cases one shall have the land *per formam doni* that is not issue of the body of the donee, which see Section 30.

18. E. 2. tit.
Bre. 836.
24. E. 3. 28.

(7. Co. 41.
Ow. 152.)

"*Engendres.*" This word may in many cases be omitted or expressed by the like, and yet the estate in taile is good: as, *hæredibus de carne, hæredibus de se, hæred' quos sibi contigerit, &c.* as is aforesaid; and where the word of Littleton is, ingendred, or begotten, *procreatis*, yet if the word be *procreandis*, or *quos procreaverit*, the estate in taile is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before. (3).

Sect. 16.

TENANT en taile speciall est, lou terres ou tenements sont dones a un home et a sa feme, et a les heires de leur deux corps engendres. En tiel case nul poet inheriter per force de le dit done, forsque ceux que sont ingendres perenter eux deux. Et est appelle speciall taile, pur ceo que si la feme devy,

TENANT in taile speciall is, where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendred between them two. And it is called especiall taile, because if

(2) [See Note 121.]

(3) [See Note 122.]

devy, et il prent auter feme, et ad issue, l'issue del second feme ne serra jammes inheritable per force de tiel done, ne auxy l'issue del second baron, si le primer baron devie.

if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherite by force of this gift, nor also the issue of the second husband, if the first husband die.

“**A** UN home et sa feme.” [a] Then put the case that lands be given to a man and a woman unmarried, and the heires of their two bodies; for the apparent possibilitie to marry, they have an estate taile in them presently. [b] So it is where lands be given to the husband of A. and to the wife of B. and the heires of their bodies, they have presently an estate in taile, in respect of the possibilitie.

[a] 5. H. 7. 10.
11. E. 3.
Formdon 30. Pl.
Com. 35.

[b] 10. Co. 120.
Chudley's case.
40 Aff. Pl. 13.
34. Aff. Pl. 1.

Fleta lib. 5. c. 34.

If a feme sole do enfeoffe a married man *causâ matrimonii prælocuti*, it is good for the possibilitie. But put the case that the premises and the *habendum* be in other manner than Littleton hath put, and let us see what the law is in these cases. [c] (1) As if a man in the premises give lands to another and the heires of his bodie, *habendum* to him and his heires for ever; it hath beene holden that in this case he hath an estate taile, and a fee simple expectant. And so (it is said) *vice versa*, if lands be given to a man and to his heires in the premises, *habendum* to him and the heires of his bodie, that he hath an estate taile, and a fee simple expectant. But *vid. lib. 8. fo. 154. b.* otherwise resolved, *ut patet ibi* (2). [d] If lands be given to B. and his heires, to have and to hold to B. and his heires, if B. have heires of his bodie, and if he die without heires of his bodie that it shall revert to the donor, this is adjudged an estate taile, and the reversion in the donor. [e] For *voluntas donatoris in chartâ doni sui manifestè expressa observetur*; and therefore in the case next precedent, if these or the like words be added (and if he die without heires of his bodie, that the lands shall revert to the donor), that then the *habendum* shall by authoritie of divers bookes be construed upon the whole deed, to be a limitation or a declaration, what heires are meant in the premises to inherit, and that in that case the reversion is in the donor (3).

(Plowd. 35.
Post. 25. b.
F. N. B. 205. b.
Post. 204. a.
1. Ro. Abr. 419.)
[c] 21. H. 6. 7.
(Perk. Sect. 18.
170. 2. Sid. 78.
8 Co. 56. b.
8. Co. 154.
Plowd. 147.
2. Ro. Abr.
680.)

[d] 30. Aff.
p. 47. 35. Aff.
p. 14. 37. Aff. 15.
5. H. 5. 6.
(2. Ro. Abr. 68.
Cro. Jam. 595.
290. 427. 448.)
[e] W. 2. cap.
22.

[f] If a man make a charter of feoffment of an acre of land to A. and his heires, and another deed of the same acre to A. and the heires of his bodie, and deliver *seisin* according to the forme and effect of both deeds, in this case he cannot take a fee simple onely, as some hold, for that liverie was made according to the deed in taile, as well as to the charter in fee, neither can the livery enure onely to the deed of estate taile with a fee simple expectant, for that liverie was made as well upon the deed in fee simple, as the deed in taile. Therefore others hold, that in that case it shall enure by moities, that is, to have an estate taile in the one moitie, with the fee simple expectant, and a fee simple in the other moitie; and so the liverie shall worke immediately upon both deeds (4).

[f] 2. H. 6. 25.
45. E. 2. 20.
(Vid. 5. Co. 25.
where two fines
are levied.)

(1) [See Note 123.]

(3) [See Note 125.]

(2) [See Note 124.]

(4) [See Note 126.]

Sect. 17.

EN mesme le maner est, lou tenements sont dones per un home a un auter ove un feme, que est la file ou cousin al donour en frankmariage, le quel done ad un enheritance per ceux parolx (frankmariage) a ceo annexe, coment que ne soit expressement dit ou rehearce en le done, c'est a scavoir, que les donees averont les tenements a eux et a lour heires perenter eux deux engendres. Et ceo est dit especial taile, pur ceo que l'issue del second feme ne poit inheriter, &c.

IN the same manner it is, where tenements are given by one man to another with a wife (which is the daughter or cousin to the giver) in frankmariage (5), the which gift hath an enheritance by these words (frankmariage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heires betweene them two begotten. And this is called especial taile, because the issue of the second wife may not inherit.

Vid. Sect. 19, 20.
(2. Ro. Abr. 67.)

5. E. 3. 17.

[g] This case is vouched in Pl. Com. 158. to be in 4. E. 3. which being not found (6) in that yeare, it is there so left without any further reference, but you shall find it as above said in 5. E. 3. 17.

W. 2. ca. 1.
19. E. 3. tit.
Taile 1.

(1. Ro. Abr.
84c.)

[b] 6. E. 3. 33.
Fitz. N. B. 172.
7. E. 4. 12.
15. E. 2. Cui in
vita. Sect. 24.

A UN home ove un feme." Albeit the gift is made of the land to the man with his daughter, &c. yet is the gift good to them both in speciall taile, and therefore that of *Stephen de la More* in [g] 5. E. 3. is very remarkeable, where the case was, that *Robert* gave the reversion of lands which *Agnes* his wife did hold for her life to *Stephen de la More*, *habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filiâ ejusdem Roberti*, and it is adjudged that it is a good estate taile. Wherein three things are to be observed: first, that *Joane* the daughter took with her husband an estate in especiall taile, albeit she were named but under a *cum*, viz. *cum Johanna*, &c. (7). 2. That *cum* doth come after the *habendum*, for that it is all but one sentence. 3. That these words, *in liberum maritagium*, doe create an estate of inheritance in especiall taile, as *Littleton* saith, *le donee ad un inheritance per reason de ceux parolx (frankmariage) a ceo annexe, coment que ne soit expressement dit, &c.* But this had need of some interpretation, for if lands be given by these words (in frankmariage), according to the rules of law, then do these words create an estate of inheritance in speciall taile: for the consideration of marriage is in that case more favoured in law, than any other consideration. But though the gift be in these words, yet if it be not consonant to the rules of law in other things requisite thereunto, there they create but an estate for life. And therefore to speak once for all, four things be incident to a frankmariage. First, that it be given for consideration of marriage either to a man with a woman, or, as some have held to a woman with a man. For in [b] 6. E. 3. 33. in *Piers de Saltmarsh* his case, a man gave land to his sonne in frankmariage; and *Fitz. N. B.* 172. taketh the law so also: and 7. E. 4. 12. *per Moyle* against a new opinion in *temps H.* 8. Br. tit. Frankmariage, the former bookes being not remembred. Secondly, that the woman

[21. b.]

(5) Before or after marriage. Dy. 147.
Hal. MSS.—See acc. post. 21. b. and
176. a.

(6) The case is 4. E. 3. 4. Hal. MSS.
(7) [See Note 127.]

woman or man that is the cause of the gift [i] be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. Thirdly, if the gift be made of such a thing as lyeth in tenure, that the donees hold of the donor at the time of the estate in frankmariage made. A rent service [k] may be given in frankmariage, because it may be holden. And so may a rent charge or rent secke, as *Fitz. N. B.* holdeth, and it appeareth in our bookes that a common was granted in frankmariage. (1) Fourthly, that the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with a sonne of the donor in frankmariage, there passeth an inheritance; but if the donee that is the cause of the gift be not of the blood of the donor, then there passeth but an estate for life if livery be made. Also if [l] lands be given to a man with a woman of the blood of the donor *in liberum maritagium*, the remainder in fee either to a stranger or to the donees, they have no estate taile, because there is no tenure of the donor (2); but if [m] in that case, the remainder had become limited to another in taile reserving the reversion in fee to the donor, there the said words (*in liberum maritagium*) create an inheritance, because the donees hold of the donor. And this is the cause that it is holden, that a man cannot devise land in frankmariage because the donee cannot hold of the donor. And *cestuy que use* before the statute of 27. H. 8. could not have made a gift in frankmariage, because the reversion was in the feoffees. [n] And if the donor doth give lands in *liberum maritagium* reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmariage is good; for if the reservation should be good, then could not the donees have an estate taile for want of the words of the heires of their bodyes (3).

[i] 4. E. 3. 8.
31. E. 1. taile
30. Bracton
lib. 2. cap. 7.

[k] 22. R. 2.
tit. Descent 50.
Fitz. N. B. 212.
9. H. 6. 35. b.
W. 2. ca. 1. acc.

[l] Temps H. 8.
Br. frankmar.
11. 13. E. 1.
formdon 63.
Vid. 32. E. 1.
tail. 25. 2. E. 2.
Feoffment &
faits 9.
17. E. 3. 5. a.
45. E. 3. 20.
(1. Ro. Abr.
840.)
[m] 20. E. 2.
aid 174. 21. E. 3.
Gard. 216.
[n] Bract lib. 2.
cap. 7. 32. E. 1.
taile 31.
13. H. 4. 74.
4. H. 6. 17.
26. Aff. 66.
31. E. 3.
Gar. 29.

“ *En frankmariage.*” *Liberum maritagium*, free marriage. *Maritagium* is taken for fee taile, and divideth *maritagium* into *liberum et servitio obligatum*: and herewith agreeth *Bracton* [o] lib. 2. cap. 34. and 39. *Maritagium est aut liberum aut servitio obligatum*, and lib. 2. ca. 7. nu. 3. and 4. *Liberum maritagium dicitur, ubi donator vult quod terra sic data queta sit et libera ab omni seculari servitio*. And so, before *Bracton*, said *Glanvill*. lib. 7. ca. 18. *Maritagium autem aliud nominatur liberum aliud servitio obnoxium. Liberum dicitur maritagium, quando aliquis liber homo aliquam partem terre sue dat cum aliqua muliere in maritagium, ita quod ab omni servitio terra illa sit queta, &c.* And after both of them *Fleta* that followeth them both, lib. 3. cap. 1. saith, *est autem quoddam maritagium liberum ab omni servitio solutum donatori vel ejus heredi, &c.* Et est similiter *maritagium servitio obligatum et oneratum, &c.* And these words (*in liberum maritagium*) are such words of art, and so necessarily required, as they cannot be expressed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter *in connubio soluto ab omni servitio, &c.* yet there passeth in this case but an estate for life; for seeing that these words (*in liberum maritagium*) create an estate of inheritance against the generall rule of law, the law requireth that they

26. Aff. p. 66.
per Wilbye.

[o] Bract. lib. 2.
cap. 34. & 39.
& lib. 2. cap. 7.
nu. 3. & 4.
Glanvill. lib. 7.
ca. 1. & ca. 18.

Fleta lib. 3.
cap. 1.

(1) [See Note 128.]

(3) [See Note 130.]

(2) [See Note 129.]

Lib. 1. Cap. 2. Of Fee taile. Sect. 18.

30 E. 1. tit.
Formdon 66.
adjudg acc.
(2. Inst. 336.)

31. E. 3. tit.
Gard. 116.
Mirr. cap. 2.
sect. 15. acc.

9. H. 3. Dower.
202.

7. H. 4. 16.

[p] 13. E. 3. tit.
Aff. 19. E. 3.
Aff. 83.
12. Aff. 22.
19. Aff. 2.

3. E. 3. Aff. 45.
(F. N. B. 204.)
[q] Pl. Com.
Carril's case.

[r] 17. H. 3. tit.
Gard. 146.

27. E. 3. 79.

they should be legally pursued. But then it may be demanded, if a man had given lands at the common law, *in libero maritagio*, whether had the donees a fee simple without these words (heires), for that it appeareth by that which hath beene said before, that all gifts in taile were fee simple at the common law, and that the statute of *W. 2.* did not create any estate in fee taile, but out of an estate in fee simple. To this it is answered, that these words (*in liberum maritagium*) did create an estate in fee simple at the common law: and it is holden in 31. E. 3. gard. 116. *Per ceux parolx in frankmariage les donees averont les terres a eux et a leur heires perenter eux engendres, et ceo est dit especial taile.* But yet betweene donees in frankmariage and other donees in speciall taile there be many notable diversities. If the king give land to a man and a woman, and the heires of their two bodies, and the woman die without issue, yet shall the man be tenant in taile *apres possibilitie*. But if the king give land to a man with a woman of his kindred in a frankmariage, and the woman dyeth without issue, the man in the king's case shall not hold it for his life, because the woman was the cause of the gift; but otherwise it is in the case of a common person, if lands be given to a man and a woman in especiall taile, and they are divorced *causa præcontractus*, both shall hold the lands for their lives; but in [p] case of frankmariage if they be so divorced, the woman shall enjoy the whole land, because she was the cause of the gift (1). If lands holden in socage [q] be given in especiall taile, and the donees die the issue being within the age of 14 yeares, [r] the next of kinne of the part of the father or of the part of the mother which can hap the custody shall have it, but in case of frankmariage the heire of the part of the mother shall have it, because as it hath been said she was the cause of the gift.

[22. a.]

Sect. 18.

ET nota, quòd hec verbum (*Talliare*) idem est quòd ad quandam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare. *Et pur ceo que est limit et mis en certaine, quel issue inheritera per force de tiels dones, et come longement l'enheritance endurera, il est appelle en Latin, feodum talliatum, i. e. hæreditas in quandam certitudinem limitata. Car si tenant in general taile morust sans issue, le donor ou ses heirs poient entrer come en leur reversion.*

AND note, that this word (*Talliare*) is the same as to set to some certaintie, or to limit to some certaine inheritance. And for that it is limited and put in certaine, what issue shall inherite by force of such gifts, and how long the inheritance shall indure, it is called in Latine, *feodum talliatum, i. e. hæreditas in quandam certitudinem limitata*. For if tenant in generall taile dieth without issue, the donor or his heires may enter as in their reversion (3).

“ ET

(1) *Keilw.* 104. b. *Accord. Hal. MSS.* See also acc. *Perk. Sect.* 238.

(3) [See Note 132.]

"*E*^T nota." This in our author, throughout his three bookes, (Ante 17. b.) betokens some notable point of instruction worthy of more speciall observation, which is often [S] used by him, as you may perceive by the Sections noted in the margent (2). [S] Sect. 18. 37. 42, 43. 49, 50. 64. 72. 89, 90. 104. 108. 114. 116. 147. 158. 161. 168. 170. 183. 254. 279. 346. 387. 452. 467. 618, 619. 637. 642. 670. 682. 684. 711. 717. 719. 738.

"*Feodum talliatum, i. e. hæreditas in quodam certitudinem limitata.*" Here our author doth interpret what *feodum talliatum* is, West. 2. cap. 3. Pl. Com. 251. n. Of all the estates taile most coercted or restrained, that I finde in our bookes, is the estate taile in 39. Aff Pl. 20. where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only; 39. Aff. Pl. 20. (1. Co. 66. 104. Ante 8. b. 1. Ro. Abr. 838.) this case being adjudged in the point is an exception (some say) out of the generall rule put before by Littleton, Sect. 13. that all Sect. 13. Vid. Pl. Com. fo. 29. b. estates taile were fee simple at the common law; for (say they) by this limitation (*hæredi*) in the singular number the donees had not had a fee simple at the common law. *Vide Registrum Regist. Judic. Judiciale*, fo. 6. a gift made to a man *et hæredi masculo de corpore suo* (4). fo. 6.

Sect. 19.

*E*N mesme le maner est del tenant en special taile, &c. Car en chescun done en le taile sauns plus ouster dire, le reversion del fee simple est en le donor. Et les donees et lour issues ferront al donor et a ses heires autielx services, come le donor fait a son seignior prochain a luy paramount, forsprise les donees in frankmarriage, les queux tiendront quietment de chescun manner de service, sinon que soit per fealtie, tanque le quart degree soit passe, et apres ceo que le quart degree soit passe l'issue en le cinque degree, et issint ouster l'auters des issues apres luy, tiendront del done ou ses heires come ils teignent ouster, come il en avant dit.

*I*N the same manner it is of the tenant in especiall taile, &c. For in every gift in taile without more saying, the reversion of the fee simple is in the donor. And the donees and their issue shall do to the donor and to his heires the like services, as the donor doth to his lord next paramount, except the donees in frankmarriage, who shall hold quietly from all manner of service (unlesse it be for fealtie) untill the fourth degree is past, and after the fourth degree is past the issue in the fift degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

"*E*N chescun done en taile sans plus ouster dire, la reversion del "fee simple est en le donor." This is wrought by the construction (2. Inst. 331. 333.)

of the statute of W. 2. cap. 1. which hath turned the fee simple of the donee into a particular estate of inheritance, and the possibility of the donor, to a reversion in him expectant upon the estate taile, so as there be two inheritances of one land: yet this was doubted in our bookes [t], and there resolved according to Littleton. But I see no cause wherefore that point should be drawne in

[1] 12. E. 4. 23. 5. H. 7. 14. West. 2. ca. 13. Pl. Com. 247, 45. E. 3. 20

248. 251. 562. 2. E. 2. tit. resceit 147. 33. H. 6. 27. 39. E. 3. 18.

question,

(2) [See Note 131.]

(4) [See Note 133.]

question, for at the same session of parliament (in which the statute *de donis conditionalibus* was made) viz. ca. 3. it is expressly said, *vel per donum in quo reservatur reversion*, so as by the judgment of the same parliament a reversion was settled in the donor.

(Post. 142. b.
Plowd. 151. 162.
196, 197. Cro.
Cha. 400.)

“ *Le reversion del fee simple est en le donor.*” A reversion is (1) where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt*. Tenant in fee simple maketh gift in taile, so it is of a lease for life, or for yeares. If a man extend lands by force of a statute merchant, staple, recognizance or *elegit*, he leaveth a reversion in the conusor. But since *Littleton* wrote, the description must be more large upon the statute of [a] 27. H. 8. for at this day, if a man seised of lands in fee make a feoffment in fee, (and depart with his whole estate) and limit the use to his daughter for life, and after her decease to the use

[a] 27. H. 8.
ca. 10.
(Cro. Cha. 24.
1. Ro. Abr. 625.
1. Co. 104. b.
2. Co. 91.
2. Ro. Abr. 417.
1. Leon. 182.)
[b] 28. E. 3. 26.
27. E. 3. Page
118. 24. E. 3. 36.
40. E. 3.

of his sonne, in taile, and after to the use of the right heires of the feoffor: in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himselfe, yet hath he a reversion (2); [b] for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasors. And here in this case when the limitation is to his right heires, and right heire he cannot have during his life (for *non est hæres viventis*) the law doth create an use in him during his life, untill the future use commeth in esse, and consequently the right heires cannot be purchasors; and no diversitie when the law creates the estate for life, and when the party. And all this was adjudged betweene [c] *Fenwicke and Misford* in the king's bench, and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him, because the use of the fee continued ever in him (3); and the statute doth execute the possession to the use in the same plight, quality, and degree, as the use was limited.

[c] Tr. 31. Eliz.
inter Fenwicke
& Mitford.
32. H. 8. gard.
93. 28. H. 8.
Dier. 8, 9, 10.
&c. Bucken-
ham's case.
5. Marie. Dier.
163.
(1. Ro. Abr.
828. M. 284.)
[d] 1. H. 5. 8.
4. H. 6. 20.
9. Eliz. Dier.
Bromley's case.

[d] If a man make a gift in taile, or a lease for life, the remainder to his own right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said, that *hæres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires are so totally in him, as he may give the lands to whom he will.

[e] Dier. 5.
Marie 156.
Groswold's
case adjudge.
Bendlowes
Serjant in his
report agreeth.
(Hob. 30. 33.
1. Mod 237. 1.
1. Ro. Rep. 240.)

[e] So it is if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heires male of his owne body, this is a void remainder; for the donor cannot make his own right heire a purchaser of an estate taile without departing of the whole fee simple out of him (4): as if a man make a feoffment in fee to the use of himselfe for life, and then to the use of the heires male of his body, this is a good estate taile executed in himselfe, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that

13

(1) By what words a reversion will pass, see Vi. Abr. *Reversion* G. and Com. Dig. *Estates* B. 12.

(2) Vid. 3. & 4. P. & M. Dy. 134. contra. Hal. MSS. But see the case cited

by lord Hale in the next note, and also ante 12. b. and note 2. there.

(3) [See Note 134.]

(4) [See Note 135.]

is apparent, for a limitation of use to himselfe had without question beene good.

(5) [f] If a man make a feoffment in fee to the use of himselfe in taile, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate taile executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

[f] 20. Eliz. Dier.

[23. a.]

To conclude this point, [g] whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two acres, the one holden by knights service by prioritie, and the other by knights service holden by posterioritie, and maketh a feoffment in fee of both acres to the use of himselfe and his heires, the old use continues in him, and the prioritie and posterioritie remaine. So it is of lands of the part of the mother, the use shall goe to the heire of the part of the mother, which could not be, if it were not the old use, but a thing newly created. The like law of lands of the custome of Borough-English, Gavelkind, &c. (1)

[g] 13. H. 7. 6.
28. H. 8. Dier
12.
(3. Co. 81. b.
Cro. Jam. 201.
Post. 271. b.)

5. E. 4. 7.
1. Co. 76. 84.
85. 100, &c.
Chudley. 2. Co.
56, 57, 58. 77.
78. 4. Co. 22.
6. Co. 34. 43.

“ *Les donees et leur issues ferraient al donator et a ses heires autiels services, come le donator fait a son seignior procheine a luy paramount.* ” The reason of this is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over (2): as if the tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over, and before the statute of W. 2. the donee had holden of the donor as of his person, and now of him as of his reversion: but if a man make a lease for life, or years, and reserve nothing, he shall have fealtie only and no rent, though the lessor hold over by rent, &c. And this, that Littleton saith, is regularly true, if the donor maketh no speciall reservation, for then the speciall reservation excludes the tenure which the law would create. As if tenant by knights service maketh a gift in taile reserving fealtie and rent, the donee shall hold in socage, by fealtie and rent, and not by knights service (3). But if a man hold land of the king in grand serjeantie, and maketh a gift in taile generally, in this case the donee shall not hold of the donor by grand serjeantie, because no man can hold by grand serjeantie, but of the king only, as hereafter shall be said; and therefore seeing grand serjeantie doth include knights service, he shall in that case hold of the donor by knights service. If a man seised of land in the right of his wife holden by knights service give the same lands in taile generally, the donee shall not hold of him by knights service, because his wife held the land, and he had nothing out in her right. And in that case the baron hath gained a new reversion by wrong, and therefore such a donee shall doe fealtie only (4).

(Post. 143. a.)

(2. Ro. Abr.
501.)

A. seised of two acres of land, holdeth the one of B. by knights service, and twelve pence rent, and the other of C. in socage and one pennie rent, and makes a gift in taile of both acres without any expresse reservation of any tenure. In this case the donor hath but

(Doctr. Plac.
53.)

one

(1) [See Note 136.]

(3) [See Note 138.]

(2) [See Note 137.]

(4) [See Note 139.]

one reversion. And yet he shall make several avowries, because there be severall tenures created by law in respect of the severall tenures over: and the avowrie is made in respect of the tenures.

(2. Ro. Abr.
501.)

Lord, mesne and tenant, the tenant holdeth by four pence, and the mesne by twelve pence, the tenant makes a gift in taile without reserving any thing, by reason whereof he holdeth by four pence, in respect of the tenure over. Afterwards the reversion escheats, now shall the donee hold by twelve pence, for the mesnaltie which was four pence is extinct, and the law reserved the tenure upon the gift in taile, in respect of the mesnaltie, and when the mesnaltie is extinct, the former rent between the donor and donee is extinct also; and then by the same reason that the donee shall take advantage, if the donor by release or confirmation had holden by lesser services, by the same reason he shall be prejudiced, when he holdeth by greater services (5).

49. E. 3. 10.

Bracton lib. 2.
fo. 21.
Britton cap. 119.
Fleta lib. 3.
cap. 11. & lib. 6.
cap. 2.
Vide Sect. 17. 20.
(Ante 11. b.
Post. 178. a.)

“*Forprise les donees en Frankmarriage.*” It is to be understood, that although the land be given in *liberum maritagium*, in free marriage generally, yet first the law doth make a limitation of this word (free), viz. till the fourth degree be past, for the reason that our author here yeeldeth (6). And 2. albeit it be free marriage, yet the donees and their issues untill the fourth degree be past shall do fealtie, for that is incident to everie tenure (except frankealmoigne) and cannot be separated from it, and therefore the donees and their issues shall hold it as freely till the fourth degree be past as the donor can make it. See more of this in the Chapter of Frankalmoigne.

Sect. 20.

ET les degrees en frankmarriage
serront accompts en tiel manner,
scil. de le doner a les donees en frank-
marriage le primer degree, pur ceo que
la feme que est une des donees covient
estre file, soer, ou autre cousin a le doner.
Et de les donees tanque a lour issue il
serra accompt le second degree, et de
lour issue tanque a son issue le tierce
degree, et issint ouster, &c. Et la cause
est, pur ceo que apres chescun tiel done,
les issues queux veignent de le doner, et
les issues queux veignent de les donees
apres le quart degree passe de ambideux
parties en tiel forme d'estre accompt,
poyent enter eux per la ley de saint esglise
entermarie. Et que le donee en frank-
marriage serra dit le prime degree de les
quart degrees, home poit veier en un plee
sur

AND the degrees in frankmarriage
shall be accounted in this man-
ner, viz. from the donor to the donees
in frankmarriage the first degree, be-
cause the wife that is one of the
donees ought to be daughter, sister, or
other cosen to the donor. And from
the donees under their issue shall be
accounted the second degree, and from
their issue unto their issue the third
degree, and so forth. And the reason
is, because that after every such gift,
the issues of the donor, and the issues
of the donees after the fourth degree
past of both parties in such forme to
be accounted, may by the law of the
holy church entermarie (1). And
that the donee in frankmarriage shall
be said to be the first degree of the
four

(5) Vid. *Keilw.* 125. 129.—Hal. MSS.

(6) [See Note 140.]

(1) [See Note 141.]

sur un breve de droit de garde, P. 31. E. 3. lou le pl. counta que son tres-aiel fuit seisie de certe terre, &c. et ceo tenuit d'un autre per service de chivaler, &c. quel dona la terre a un Rafe Holland ovesque sa soer en frank-marriage, &c.

four degrees, a man may see in a plea upon a writ of right of ward, P. 31. E. 3. where the pl. pleadeth that his great grandfather was seised of certaine lands, &c. and held the same of another by knights service, &c. who gave the land to one *Raphe Holland* with his sister in frank-marriage, &c.

[23. b.]

WHERE *Littleton* saith [a] that the donees in frankmarriage shall hold by tealtie only untill the fourth degree be past, and then the issue in the fift degree shall hold of the donor as the donor holdeth over. [b] *Vide Bracton ubi supra, Ita quod ille cui terra sit data fuit, nullum inde faciat servitium usque ad tertium hæredem, et usque quartum gradum, ita quod tertius hæres sit inclusus.* And herewith also agreeth *Fleta ubi supra.* And the [c] learning of degrees set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that *Littleton* and the law in this case may the better be understood, which I will divide into

Rule 1.

2. So as how many persons there be, take away one, and you have the number of degrees. If there be four persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father, and add the sonne, and it is one degree; then take the sonne and add the grandchild, and it is the second degree; and so likewise further. Wherein observe that the father, son and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

(Plowd. 444.)

3. It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civill law in the ascending and descending line (2); for those whom the civilians do reckon in the second degree, the canonists do reckon in the first (3); and those whom they place in the fourth, these place in the second. Therefore if we will know in what degree two of kindred do stand according to the civil law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appeare in what degree they are. For example, in brothers and sisters sonnes, take one of them and ascend to his father, there is one degree from the father to the grandfather, that is the second degree; then descend from the grandfather to his sonne, that is the third degree; then from his sonne to his sonne, that is the fourth. But by the canon law there is another

(Vid. Stat. 32. H. 8. cap. 38. of marriages. 2. Inst. 683. 25. H. 8. cap. 22.)

(Plowd. 444.)

computation,

(2) The words *but in the collateral line* there is seem necessary to the sense of this passage; and though not to be found in any

edition of lord Coke's Commentary, were probably omitted by mistake.

(3) [See Note 142.]

[a] Vide Sect. 17. 19. 138. 268. 269. 271. 733.

[b] Glanvill. lib. 7. cap. 18. Bract. lib. 2. fol. 21. Britton cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2.

[c] Vide 10 E. 3. tit. avowry 157. 31. E. 3. cessavit 22. 31. E. 3. gard. 116. 21. H. 7. 30.

computation, for the canonists do ever begin from the stocke, namely, from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sonnes of two brothers stand by the canon law, we must begin from the grandfather and descend to one sonne, that is one degree; then descend to his sonne, that is another degree; then descend againe from the grandfather to his other sonne, that is one degree; then descend to his sonne, that is a second degree; so in what degree either of them are distant from the common stocke, in the same degree they are distant betweene themselves: and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stocke, in the same degree they are distant betweene themselves, and so the most remote maketh the degree. And albeit the donee be a cousin in the third or fourth degree from the donor, yet in this computation it maketh the first degree: *gradus dicitur à gradiendo, quia gradiendo ascenditur et descenditur*. And thus much of the civile and canon law is necessarie to the knowledge of the common law in this point (1): and herewith agreeth our author in the words following.

“ *Les issues queux veignent de le doner, et les issues queux veignent de les donees apres le 4. degree passe d’ ambideux parties in tiel forme d’ estre account, poient enter eux per le ley de saint esglise entemarrier.*” (*De saint Esglise*). [d] So as hereby it appeareth, that the computation of the degrees in this case, must be according to the canon law. But it is necessarie to be knowne concerning marriages betweene persons of kindred one to another, that it is enacted [e] by the statute of 32. H. 8. that no reservation or prohibition (God’s law except) shall trouble or impeach any marriage without the Leviticall degrees (2).

The case vouched by *Littleton* in 31. E. 3. you shall finde abridged by *Fitz. tit. gard. 116.* And albeit this yeare of 31. E. 3. was never in print till *Fitzherbert* did abridge it and publish it in print anno 11. H. 8. and goeth under the name of broken yeares, yet here it appeareth by our author, that the same is of authoritie in law, as hereafter also in other places shall be observed.

Sect. 21.

ET tous ceux tailes avautdits sont specifies en le dit estatute de W. 2. Auxy sont divers autres estates en le taile, coment que ne sont specifies per expresse parols en le dit estatute, mes ils sont prises per le equitie de le dit statute. Sicome terres sont dones a un home et a ses heires males de son corps engendres, en tiel

AND all these entailes aforesaid be specified in the said statute of W. 2. Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equitie of the same statute. As if lands be given to a man, and to his heires

(1) See further as to consanguinity and the manner of computing its degrees by the civil and canon law, Blackst. Law Tracts 8vo. ed. v. 1. p. 14. and 173. and the annotations in the edit. of the *Corp. Jur. Canon.*

by the *Pithæi* on that part of *Gratian's Decretum* cited by lord Hale, and Inst. lib. 3. tit. 6. et Dig. 38. tit. 10. and the commentators on those titles.

(2) [See Note 143.]

tiel case son issue male inheritera, et le issue femal ne unque enheritera pas, uncore in les auters tailes avant dits auterment est.

heires males of his bodie begotten; in this case his issue male shall inherit, and the issue female shall never inherit, and yet in the other entailes aforesaid, it is otherwise.

“ *E* tous ceux tailes avautdits sont specifiés en le dit estatute de “ Westminster 2.” And so it appeareth by the said statute. Auxy sont divers autres estates en le taile, &c. And herewith agreeth Carbonel’s case, 33. Edw. 3. titulo taile 5.

That the cases of the statute are set down but for examples of estates taile, generall and speciall, and not to exclude other estates taile. 3. E. 3. 32. 18. Aff. p. 5. 18. E. 3. 46. 1. Mar. Dyer 46. Pl. Com. Seignior Barkley’s case, fo. 251. For, *Exempla illustrant non restringunt legem*.

3. E. 3. 32.
18. E. 3. 46.
18. Aff. p. 5.
1. Mar. Di. 46.
Pl. Com. 251.

[24. b.]

“ *Equitie* ” is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-makers could not possibly set downe all cases in expresse terms: *Æquitas est convenientia rerum quæ cuncta cœquiparat, et quæ in paribus rationibus paria jura et judicia desiderat*. And againe, *Æquitas est perfecta quædam ratio quæ jus scriptum interpretatur et emendat, nullâ scripturâ comprehensa, sed solum in verâ ratione consistens*. *Æquitas est quasi æqualitas*. *Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert*. *Et jus respicit æquitatem*. (1)

(5. Co. 95.
3. Co. 31.)

Bract. lib. 4.
fol. 186.

“ *Sicome terres sont done a un home et a les [f] heires males de son corps engendres, en tiel case son issue male inheritera, et l’issue female ne unques inheritera, &c.* ” This shall be explained afterward, Sect. 24. (2)

[f] 18. Aff. p. 5.
18. E. 3. 46.
33. E. 3. tit.
Taile 5.
3. E. 3. 32.
V. Sect. 24.

Pl. Com. Seignior Barkley’s case. 1. Mar. Dy. 46.

Sect. 22 & 23.

*E*N mesme le manner est, si terres ou tenements soient dones a un home et a ses heires females de sont corps engendres; en tiel case son issue female luy inheritera per force et form de le dit done, et nemy issue male, pur ceo que en tiels cases de dones faits en le taile, queux doivent enheriter, et queux nemi la volunt del donor serra observe.

*I*N the same manner it is, if lands or tenements be given to a man and to his heires females of his bodie begotten; in this case his issue female shall inherit by force and forme of the said gift, and not his issue male. For in such cases of gifts in taile, the will of the donor ought to be observed, who ought to inherit, and who not.

E T

AND

(1) As to the construing statutes by equity, see Plowd. 9, 10. 17, 18. 36. 46. 53. 57. 59. 82. 88. 109. 124. 177. 204. 244. 363, 364. 366. 371. 464. 466. See also

Vin. Abr. Statutes E. 6. Hatt. Treat. on Stat. Aff. Expolit. of Stat. by Eq. and Com. Dig. Parliament R. 10.

(2) [See Note 144.]

ET en le case que terres ou tenements sont dones a un home, et a ses heires males de son corps issuant, et il ad issue deux fits, et devy, et l'eign fits entra come heire male, et ad issue file et devy, son frere avera la terre, et nemi la file, pur ceo que le frere est heire male. Mes autrement serra en autres tailes, queux sont specifiés en le dit statute.

AND in case where lands or tenements be given to a man, and to the heires males of his bodie, and he hath issue two sonnes, and dieth, and the eldest son enter as heire male, and hath issue a daughter, and dieth, his brother shall have the land, and not the daughter, for that the brother is heire male. But otherwise it is in the other entailles, which are specified in the sayd statute.

THESE two Sections, or any thing therein, do need no explanation, in respect they shall be also explained hereafter in the next Section, saving onely these words (*queux doivent inheriter*) are verie observable, for they implice a diversitie betweene a discent and a purchase. For when a man giveth lands to a man and the heires females of his body, and dyeth having issue a son and a daughter, the daughter shall inherit; for the will of the donor (the statute [g] 9. H. 6. 24. working with it) shall be observed. But in case [g] of a purchase it is otherwise: for if A. have issue a sonne and a daughter, and a lease for life be made, the remainder to the heires females of the bodie of A. A. dieth, the heire female can take nothing, because she is not heire (3); for she must be both heire and heire female, which she is not, because the brother is heire, and therefore the will of the giver cannot be observed, because here is no gift, and therefore the statute cannot worke thereupon. And so it is if a man hath a sonne and a daughter, and dieth, and lands be given to the daughter, and the heires females of the bodie of her father, the daughter shall take nothing but an estate for life, because there is no such person, she being not heire. But where a gift is made to a man, and to the heires female of his bodie, there the donee being the first taker is capable by purchase, and the heire female by descent (1), *secundum formam doni*: and therefore Littleton purposely added these words, *queux doivent inheriter*.

[25. a.]

Sect. 24.

AUXY, si terres soient donees a un home et a les heires males de son corps engendres, et il ad issue file, quel ad issue fits, et devy, et puis apres le donee devy; en cest case, le fits de la file ne inheritera pas per force de la taile; pur ceo que quecunque que serra inheriter per force d'un done en le taile fait as heirs males, covient convayer son discent tout per les heires males. Mes en tiel case le donor poet entrer, pur ceo que le donee est mort sans issue male en la ley,

ALSO, if lands be given to a man and to the heires males of his body, and he hath issue a daughter, who hath issue a sonne, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entail; because who-soever shall inherit by force of a gift in taile made to the heires males, ought to convey his descent whole by the heires males. Also in this case the donor may enter, for that the donee is dead without

(3) [See Note 145.]

(1) [See Note 146.]

ley, entaunt que le issue del file ne poet conveyer a luy mesme le discent per heyre male.

without issue male in the law, inso-much as the issue of the daughter cannot convey to himselfe the descent by an heire male.

“**Q**UECUNQUE serra enheriter per force d'un done en taile, “*Ec.*” Vide Tr. [b] 28. H. 6. tit. Devise 18. (which is not in the booke at large, but written *verbatim* out of Statham). If a man devise lands to a man, and to the heires males of his body, and (2) hath issue a daughter, which hath issue a sonne, this sonne shall be inheritable, and notwithstanding in a gift in taile the law is otherwise, and that by the opinion of all the judges in the exchequer chamber. But I hold this case to be ill reported, unlesse you will referre the opinion of the judges to the gift in taile last mentioned.

61. tit. nosme 1. & 40. (Hob. 33. Post. 377.)

For first, albeit a devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. Secondly, there is no intent of the devisor appearing, that the sonne of the daughter should, against the rule of law, inherit, and the statute provideth: that *voluntas donatoris, &c. observetur*. And I have heard this case often denied to be law, both in the king's bench and in the common pleas. Vide Pl. Comment. 414. b. And so it is [i] *mutatis mutandis*, when a gift in taile is made to a man, and to the heires females of his body, and he hath issue a sonne, who hath issue a daughter; this daughter shall never inherit, because she must convey by descent from females. And for the reason hereof see a notable case in 15. E. 2. tit. Corone 385. where it is adjudged (as before it had beene) that the sonne of a female should have an appeale of the death of a cosine, and yet the daughter her selfe should never have had it. But there it is agreed, that the sonne of a female [k] in a *libertate probandâ*, should be no witnesse or prooffe against the issue of the male. And the reason of this diversity is very observable: for by the common law the female might have had an appeale as heire to any of her ancestors, as well as the male. But by the statute of *Magna Charta*, cap. 34. *Nullus capiatur aut imprisonetur propter appellam fœminæ de morte alterius quàm viri sui*, which restraineth not the sonne of the female. And there *Scrope* saith, *per tous le serjeantis d' Angleterre*, that is, by all the judges of the coise in *England*, it was awarded, that the issue of the female should have an appeale for the death of his cousin. But in a *libertate probandâ*, the issue of the blood female shall not be received to prove villenage in the issue of the blood male, for the mother was disabled by the common law, and the mother might be a neife *de eu et trene*, that is, of the water and whippe of three cords (meaning such a bond-woman as is used to servile workes and correction), and enfranchised by her husband. All which appeareth in the said booke. And it is holden in 17. E. 4. 1. that if a man be slaine which hath no heire of the part of his father, that his uncle of the part of his mother shall have the appeale, and yet he must of necessity make his conveyance by a woman. Vide 20. H. 6. fo. 33. the question suddenly demanded and debated, and no consideration

Vid. Sect. 719.
[b] 1. H. 6. 24.
11. H. 6. 13, 14.
28. H. 6. tit.
Devise 18.
Statham tit.
Devise. Pl. Com.
in Scholast.
case 414. b.
20. H. 6. 43.
37. H. 8. Br. tit.
Done & Rem.

(1. Ro. Abr. 841.)

[i] 11. H. 6. 13.

15. E. 2. tit.
Cor. 385.
(Ante 6. b.)

[k] Mirror c. 2.
sect. 7. Vid.
Glanvil. lib. 14.
cap. 3.

(2. Inst. 68.)
Vid. Seignior de
la Ware's case.
11. Co. fo. 1.

17. E. 4. 1.

20. H. 6. 33.

or

(2) The word *he*, to describe the devisee, is wanting. See acc. Stath. Abr.

[25. b.]

(Post. 377.)

[1] Stanford 58.

b. 15. E. 2.

sit. Coron. 384.

or mention had of the said former judgments and authorities. There it is compared to a gift in taile to a man and to his heires males of his body, that the heire male of the daughter shall not inherit; which hath no affinity to it; and yet the authority of the booke is great, for it is by the assent of all the justices of the one bench and the other in the exchequer chamber; and therefore I leave the learned and judicious reader to his owne judgment. [2]

Vide Stanford 58. b. 15. E. 2. 384. If a man give lands to a man and to the heires males of his body begotten, remainder to him and to his heires females on his body begotten, the donee hath issue a sonne, who hath issue a daughter, who hath issue a son, this sonne is not inheritable to either of both these estates taile, because, as *Littleton* saith, the male must make his conveyance only by males, and so must the female by females. But in this case the land shall revert to the donor. And therefore the safest way, when a man will entaile his lands to the heires males and females of his bodie, is to limit the first estate to him and the heires males of his body, the remainder to him and to the heires of his body, and then all his issues whatsoever are inheritable. But if *A.* hath issue a sonne and a daughter and dieth, and the sonne hath issue a daughter and dieth, and a lease for life is made, the remainder to the heires females of the body of *A.*; in this case the daughter of *A.* shall not take *causâ quâ supra*. But albeit the daughter of the son maketh her conveyance by a male, she shall take an estate taile by purchase, for she is heire and a female; but if lands be devised to one for life, the remainder to the next heire male of *B.* in taile, and *B.* hath issue two daughters, and each of them hath issue a sonne, and the father and daughters die, some say this remainder is void for the uncertainty; some say that the eldest shall take it, because he is worthiest; and others say that both of them shall take, for that they both make but one heire (1). If lands be given to a man and to the heires males or females of his body, he hath an estate in generall taile in him.

(Hob. 31.)

11. H. 6. 13.

9. H. 6. 25.

Sect. 25.

EN mesme le manner est, lou tenements sont done a un home et a sa feme, et a les heires males de leur deux corps engendres, &c.

11. E. 3. Formedon 20.

(Ante 20. b.)

[m] 15. H. 7. 10.

1. Co. Dilon and Frein's case.

40. Aff. p. 13.

IN the same manner it is, where lands are given to a man and his wife, and to the heires males of their two bodies begotten, &c.

A UN home, et a sa feme." But what if tenements be given to a man, and to a woman being not his wife, and to the heires males of their two bodies? They have also an estate taile, albeit they be not married at that time (2). And so it is, if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heires of their two bodies; they have presently an estate taile, [m] for the possibility that they may marry. But if lands be given to two husbands and their wives, and to the heires

(1) Vid. hic fol. 10. b. *Harpur's case* Hall. MSS.

(2) [See Note 147.]

heires of their bodies begotten, [n] they shall take a joint estate for life and severall inheritances, viz. the one husband and his wife the one moiety, and the other husband and wife the other moiety, and no crosse remainder or other possibility shall be allowed by law, where it is once settled and has taken effect. But if lands be given to a man and two women and the heires of their bodies begotten, [o] in this case they have a joynt estate for life and every of them a severall inheritance, because they cannot have one issue of their bodies, neither shall there be by any construction a possibility upon a possibility (3), viz. that he shall marry the one first and then the other (4). And the same law it is, [p] when land is given to two men and one woman, and to the heires of their bodies begotten.

[n] 24. E. 3.
29. a.
(Dy. 330.)

[o] 7. H. 4. 16.
16. E. 3. 78.
Littleton, fo. 66.
15. Eliz. Dier
326.
[p] 44 E. 3. tit.
Taile 13.

[26. a.]

Sect. 26, 27.

26, 27. These two Sections need no explanation at all.

ITEM, si tenements soient dones a un home et a sa feme, et a les heires del corps del home engendres, en ceo case le baron ad estate en le taile generall, et la feme forsque estate pur terme de vie.

ALSO, if tenements be given to a man and to his wife, and to the heires of the bodie of the man, in this case the husband hath an estate in generall taile, and the wife but an estate for terme of life.

ITEM, si terres soient dones a le baron et sa feme, et a les heires le baron queux il engendra de corps sa feme, en ceo case le baron ad estate en le taile speciall, et la feme forsque pur terme de vie.

ALSO, if lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especiall taile, and the wife but an estate for life.

Sect. 28.

ET si le done soit fait al baron et a sa feme, et a les heires la feme de sa corps per le baron engendres, donque la feme ad estate en especial taile, et le baron forsque pur terme de vie (1). Mes si terres sont dones a le baron et a la feme, et a les heires que le baron engendra de corps la feme, en ceo case ambideux ont estate en la taile, pur ceo que cest parol

AND if the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in speciall taile, and the husband but for terme of life. But if lands be given to the husband and the wife, and to the heires which the husband shall beget on the body of the wife,

(3) As to the doctrine of not allowing a possibility on a possibility, see post. 184.

(4) [See Note 148.]

[26. a.]

(1) [See Note 149.]

parol (heires) n'est limit a l'un plus que a l'autre (2).

wife, in this case both of them have an estate taile, because this word (heires) is not limited to the one more than to the other.

19. H. 6. 75. a. " **H**EIRES." This word (*heires*) is nomen operativum. To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here *Littleton* putteth the case. And there-with accordeth the case of [q] 3. E. 3. where it appeareth, *quod Robertus de S. dedit Johanni de Riparijs et Matildæ uxori ejus, et heredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c.* and this adjudged to be an estate in especiall taile in them both, because the estate is equally tailed to the heires of the baron as to the heires of the wife. (3) If lands be given to the husband and the wife, and to the heires of the body of the survivour, the gift is good, and the survivour shall have an estate in taile general, but the estate taile vesteth not till there be a survivour. And hereby it appeareth [r] that a gift made to a man and to the heires of his body, is as good as to his heires of his body.

19. H. 6. 75. a. Regist. 239.
17. E. 2. tit. Taile 23.
3. E. 3. 32.
4. E. 3. 43.
5. E. 3. 29. b. & 34. a.
21. E. 3. 43.
12. H. 4. 1.
[q] 3. E. 3. 32.
21. E. 3. 43.
19. H. 6. 75. (1) per Hody.
Regist. 239.
(1. Sid. 83.)
[r] 20. E. 3. Brieve 377.

Sect. 29.

[26. b.]

ITEM, si terre soit done a un home et a ses heires, que il engendra de corps sa feme, en ceo case le baron ad estate en especial taile, et la feme n'ad riens.

ALSO, if land be given to a man and to his heires, which he shall beget on the body of his wife, in this case the husband hath an estate in speciall taile, and the wife hath nothing.

20. H. 6. 36.
[s] 1. Co. fol. 140. b.
Chudleigh's case adjudge.
(7. Co. 41.)

THIS is evident by that which hath been said, and needeth no explanation. But it hath beene said, [s] that if a man give land to another and to his heires of the body of such a woman lawfully begotten, that this is no estate taile for the uncertainty by whom the heires shall be begotten, for that the brother of the donee or other cousin may have issue by the woman, which may be heire to the donee, and estates in taile must be certaine. Therefore our author to make it plaine in all his cases added to these words (his heires) which he shall ingender. But that opinion is, since our author wrote, over-ruled, and that estate adjudged to be an estate taile, and begotten shall be necessarily intended begotten by the donee (1).

Sect. 30.

ITEM, si home ad issue fits, et devie, et terre est done al fits, et a les heires de corps son pier engendres, ceo est bone taile, et uncore le pier fuit mort al

ALSO, if a man hath issue a sonne and dyeth, and land is given to the sonne, and to the heires of the body of his father begotten, this is a good

(2) Et ils ount en cell case tiel estate, sicome terre furent donez a eux et a lez heires de leur deux corps engendrez, L. and M.

(3) [See Note 150.]

[26. b.]

(1) [See Note 151.]

*al temps de la done. Et mults auters
estates en taile y sont per le equitie del
dit estatute, que icy ne sont specifies.*

good entaile, and yet the father was
dead at the time of the gift. And
there be many other estates in the taile,
by the equity of the said statute, which
be not here specified.

“*SI home ad issue fits et devie, &c.*” John de Mandevile by his wife Roberge had issue Robert and Marwde. Michael de Morevill gave certaine lands to Roberge and to the heires of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee taile vested in Robert (heires of the body of his father being a good name of purchase), and that when he dyed without issue, Marwde the daughter was tenant in taile as heire of the body of her father per formam doni (2), and the formedon which she brought supposed, *quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred’ ipsius Johannis de præfatâ Robergiâ per præfatum Johannem procreat’ præfat’ Matildæ filie prædict’ Johannis de præfatâ Robergiâ per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædictæ*. And yet in truth the land did not descend unto her from Robert (3), but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heire tooke an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land per formam doni, by the name of heire of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing but in expectancy, when she became heire per formam doni. But where a man by deede gave lands to Emme late wife of John Master, *habendum et tenendum prædict’ Emme et hæredibus Johannis Master de corpore ejusdem Emme procreat’*; in that case the sonne and heire of John Master begotten on the body of Emme tooke no estate with Emme in the lands, because he was named after the habendum (4).

(Ante 20. b.)

17. E. 2. Taile
23. 2. E. 3. 1.
tit. Taile 7.
4. and 5. Ph.
and Mar. Dier.
156. 12. H. 4. 1.
15. H. 7. 10.
(F. N. B. 213.
E. 2. Leon. 25.
Co. Entr. 254.)

(Post 220.)

5. H. 4. 3. a.

(2. Ro. Abr. 67, 68.)

If a man hath issue two daughters, and dieth seised of two acres of land in fee simple, and the one coparcener giveth her part to her sifter, and to the heires of the body of her father, in this case the donee hath an estate taile in the moiety of the donor’s part, for the donee is not the entire heire, but the donor is heire with the donee, and she cannot give to the heires of her owne body, and the donee hath the other moiety of her sifter’s part for life. If a man hath issue a sonne and a daughter, and dieth, and land is given to the daughter and to the heires females of the body of the father, she taketh but an estate for life; because she is not heire female to take by purchase, as before hath been said.

(Ante 24. b. 2. a.)

“*Et a les heires de corps le pier.*” These words (*les heires*) are observable; for if they were (*ses heires*) it cleerly altereth the case. And therefore, if lands be given to the sonne and to his heires of the body of his father, the sonne cannot take as heire of the body of his

(2) [See Note 152.]

(4) [See Note 154.]

(3) [See Note 153.]

(Ante 20. b.
Post. 220. a.)

his father, because the grant is to him and to his heires, &c. and consequently he hath a fee simple (1). But if there be grandfather, father and sonne, and the father dieth, and lands be given to the sonne, and to the heires of the body of the grandfather, this is a good estate taile in the sonne; so as Littleton did put his case of the father but for an example (2).

“*Et multis auters estates en le taile y sont, &c.*” This needeth no explanation.

Sect. 31.

MES si home done terres ou tenements a un autre, a aver et tener a luy et a ses heires males, ou a ses heires females, il, a que tiel done est fait, ad fee simple, pur ceo que n'est my limit per le done, de quel corps l'issue male ou female issira, et issint ne poit en ascun maner estre prise per l'equitie del dit estatute, et pur ceo il ad fee simple.

BUT if a man give lands or tenements to another, to have and to hold to him and to his heires males, or to his heires females, he, to whom such a gift is made, hath a fee simple, because it is not limited by the gift, of what bodie the issue male or female shall be, and so it cannot in any wise be taken by the equitie of the said statute, and therefore he hath a fee simple.

(Ante 18. b.
Post. 68. b.)

“**T**ERRES ou tenements.” This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heires males lineall or collaterall. For albeit a female be heire at the common law, yet the shield, armories and armes descend unto them that are able to beare them (farre exceeding the nature of Gavelkind, but with several differences). And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they be by expressing the armories and armes belonging to that family, and the husbands of them may impale them or quarter them with their owne as the case shall require. And for distinction and better explanation hereof: If the king by his letters patents giveth lands or tenements to a man, and to his heires males, the grant is void, for that the king is deceived in his grant, in as much as there can be no such inheritance of lands or tenements as the king intended to grant. But if the king for reward of service granteth armories or armes to a man and to his heires males without saying (of the body), this is good, and, as hath been said, they shall descend accordingly (3).

18. H. 8. tit.
Patents. Br. 104.
(1. Co. 43. b.
46. b. Mo. 424.
Cro. Eliz. 478.)

27. H. 8. 27.

If

(1) [See Note 155.]

(2) Vid. Dy. 24. 247. 274. 157. 394.
for the form of the writ. Hal. MSS.

(3) See further as to the descent of Arms,

p. 140. b. See also on the subject of Arms in general, Dugd. Ant. Usage in bearing of Arms, and several pieces in Hearn. Antiq. Disc. 2d ed. vol. 1.

If a man by his last will devise lands or tenements to a man and to his heires males this by construction of law is an estate taile, the law supplying these words (of his bodie) (4). *Vide* the Prince's [1] case, where it appeareth that an act of parliament may limit an inheritance of lands or tenements, otherwise than common law would doe, and create a new estate of inheritance, and many authorities in law there cited worthy of note and observation. *Ros. Parliam. anno 1. E. 4. nu. 26. (5).* The [u] duchie of Lancaster is entailed to king Edward the fourth and his heires kings of England. And king Henry the sixt did by his letters patents grant *Johanni filio Johannis Talbot, quod ipse et haredes sui domini manerij de Kingston Lisle in comitatu Berk. ex nunc domini et barones de Lisle nobiles et proceres regni habeantur, teneantur, et reputenter, &c.* By this he had a fee simple qualified in the dignity (6). 2. H. 5. f. l. 1. A grant was made to a man, and to his heires tenants of the manor of Dale (7). A man seised of lands in Gavelkind gives or devises the same to a man and to his eldest heires. He cannot hereby alter the customary inheritance, but as in the case of our author, *ut res magis valeat*, the law rejecteth (males), so in this case the law rejecteth this adjective (eldest). And so it is if lands be given to a man, and to the eldest heires females of his body, yet all the daughters shall inherit, as it hath been resolved.

[1] 8. Co. 1. The Prince's case.

21. E. 3. 4.

22. E. 3. 3.

24. E. 3. 53.

9. H. 6. 25.

9. E. 4. 15.

1. Marie Dier

94.

(77. Co. 41.)

[u] Per literas patentes auctoritate parliamenta.

(3. Co. 20, 21.)

Mich. 26. & 27.

Eliz. in Com.

Banco. Leonard

Lovelace's case.

“*Et issint ne poet estre prise per l'equitie del dit statute, &c.*” For it is a certaine rule in law, that in every estate, in taile within the said statute, it must be limited either by expresse words or by words equipollent of what body the heire inheritable shall issue. And it was [x] adjudged in parliament, that where lands were given to a man, and to his heires males, that this was a fee simple, and that as well the heires females as heires males should inherit, for the grant of a subject shall be taken most strongly against himselfe.

[x] 18. Aff. p. 5.

18. E. 3. 46. 6.

(Not so in the king's case.)

9. H. 6. 23. 25.

8. Co. fol. 1.

the Prince's case,

Ancient tenures,

fol. 3.

“*Et pur ceo il ad fee simple.*” Littleton's reason being shortly collected is this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee taile; but where lands be given to a man and his heires males, he hath no estate taile, and therefore he hath a fee simple.

What actions tenant in taile may have and cannot have, *vide* Sect. 595. What great alterations have been made since Littleton wrote concerning not only leases to be made by tenant in taile, but barres alio of the estate taile itselfe by force of certaine acts of parliament made since Littleton's time, you shall read Sect. 56. and 708. (1)

(4) *Dy. 116.* Hal. MSS.—See further lord Ossulstone's case, 3. Salk. 336. and 11. Mod. 189. See S. C. cited 2. P. Wms. 2. and in Vin. Abr. *Devise* U. b. pl. 2. in marg.

(5) [See Note 156.]

(6) [See Note 157.]

(7) See further as to a qualified fee, ante 1.

b. and the books cited in n. 5. there.

[27. b.]

(1) By what acts tenant in taile may prejudice his issue or those in remainder or reversion without fine or recovery, and where his acts shall not affect them, see Vin. Ab. *Estate* F. a. to I. a. and *Tayle* D. E. F.

CHAP. 3. Sect. 32.

Tenant in Taile apres Possibilitie d'Issue extinct.

TENANT en fee taile apres possibilitie d'issue extinct est, lou tenements sont dones a un home et a sa feme en especiall taile, si l'un de eux devy sans issue, celui que survesquist est tenant en taile apres possibilitie d'issue extinct. Et s'ils avoient issue, et l'un devie, coment que durant la vie l'issue, celui que survesquist ne serra dit tenant en taile apres possibilitie d'issue extinct; uncore si l'issue devy sans issue, issint que ne soit ascun issue en vie que poit enheriter per force de le taile, dunque celui que survesquist de les donees est tenant en le taile, apres possibilitie d'issue extinct.

TENANT in fee taile after possibility of issue extinct is, where tenements are given to a man and to his wife in especiall taile; if one of them die without issue, the survivor is tenant in taile after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in taile after possibilitie of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donees is tenant in taile, after possibilitie of issue extinct.

(Dr. and Stud.
b. 2. c. 1.)

LITTLETON having spoken of estates of inheritance, viz. fee simple and fee taile, now he treateth of tenants of freehold tantum, that is, for terme of life, and therein first of tenant in taile after possibility of issue extinct; and he giveth unto him the first place, because this tenant hath eight qualities and priviledges which tenant in taile himselfe hath, and which lessee for life hath not [a]. As first, he is dispunishable for waste (2). Secondly, he shall not be compelled to attorne. Thirdly, he shall not have ayde of him in the reversion. Fourthly, upon his alienation, no writ of entrie in consimili casu lyeth. Fifthly, after his death no writ of intrusion doth lie. Sixthly, he may joine the mise in a writ of right, in a speciall manner. Seventhly, in a *præcipe* brought by him he shall not name himselfe tenant for life. Eightly, in a *præcipe* brought against him he shall not be named barely tenant for life. And yet he hath four other qualities, which are not agreeable to an estate in taile, but to a bare lessee for life. [b] (1) First, if he maketh a feoffment in fee, this is a forfeiture of his estate (2). Secondly, if an estate in fee, or in fee taile, in reversion, or remainder, descend or come to this tenant, his estate is drowned, and the fee or fee taile executed. Thirdly, he in the reversion or remainder shall be received upon his default, as well as upon bare tenant for life (3). Fourthly, an exchange between a bare tenant for life and him is good, for their estates in respect of their quantity are equal; so as the difference standeth in the quality, and not in

(Cro. Eliz. 671.)

[28. a.]

(4. Co. 63.
1. Ro. Abr. 296.)
[a] Temps E. 1.
wast. 125.
39. E. 3. 16.
31. E. 3. aid 35.
42. E. 3. 22.
43. E. 3. 1.
45. E. 3. 22.
28. E. 3. 96.
46. E. 3. 13. 27.
2. H. 4. 17.
7. H. 4. 10.
11. H. 4. 15.
21. H. 6. 56.
10. H. 6. 1.
26. H. 6. aid 77.
3. E. 4. 11.
13. E. 2.
Entre Conge 56.
Fitz. N. B. 203.
Lewes Bowles' case, 11. Co. fol. 8.
[b] 13. E. Entre Conge. 56.
45. E. 3. 22.
9. E. 4. 17.

28. E. 3. 96. 27. Aff. p. 60. F. N. B. 159. 32. E. 3. tit. ag 55. 55. E. 3. 4.
2. R. 2. refeit 147. 41. E. 3. 12. 20. E. 3. refeit. 38. E. 3. 33. Lewes
Bowles' case ubi supra.

(2) [See Note 158.]

(2) So if he mispleads, 39. E. 3. 16. Hal. MSS.

[28. a.]

(1) 43. Aff. 24. Hal. MSS.

(3) 28. E. 3. 96. Contra as to receipt. Hal. MSS.

in the quantity of the estate. And as an estate taile was originally caryed out of a fee simple, so is the estate of this tenant out of an estate in especiall taile. And he is called tenant in taile after possibilitie of issue extinct, because by no possibility he can have any issue inheritable to the same estate taile. But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them be an hundred yeeres old, and have no issue, yet do they continue tenant in taile, for that the law seeth no impossibilitie of having children. But when a man and his wife be tenant in especiall taile, and the wife dieth without issue, there the law seeth an apparent impossibility that any issue that the husband can have by any other wife should inherit this estate. And let this tenant keep his estate, for he hath these priviledges in respect of the privity of his estate, and of the inheritance that was once in him. [c] For in the case of *Evans* (4), *Mich.* 28. & 29. *Eliz.* it was adjudged, that where tenant in taile after possibility of issue extinct granted over his estate to another, that his grantee was compelled to attorne in a *quid juris clamat* (5), as a bare tenant for life, and so be named in the writ; for by the assignement the privity of the estate being altered, the priviledge was gone; and this judgement was affirmed in a writ of error, and herewith agreeth 27. *H. 6. tit. Aid. Statham* 29. *E. 3. 1. b. (6).*

[c] 11. Co. fol. 83. Lewes Bowles' case. (Post. 316.) 27. H. 6. tit. aid. Statham. 29. E. 3. 1. b. 27. H. 6. tit. aid. 29. E. 3. 1. b.

Sect. 33.

ITEM, si tenements sont dones a un home et a ses heires que il engendra de corps sa feme, en cest cas la feme n'ad ryen en les tenements, et le baron est seisie come donee en speciall taile. Et en ceo cas, si la feme devy sans issue de son corps engendres per son baron, donques le baron est tenant en taile apres possibility d'issue extinct.

ALSO, if tenements be given to a man and to his heires which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especiall taile. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in taile after possibility of issue extinct.

“**S**I la feme devie sans issue.” So as the estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of a man and his wife for tearme of their lives, and after to the use of their next issue male to be begotten in taile, and after to the use of the husband and wife, and of the heires of their two bodies begotten, they having no issue male at that time; in this case the husband and wife

Lewes Bowles' case, 11. Co. fol. 80. (1. Ro. Rep. 178. 2. Saund. 383. 387. Cro. Eliz. 315. 1. Co. 76. 2. Co. 61.)

(4) *M.* 26. 27. *Eliz.* *B. R. Leon. T.* 29. *Eliz. Clench.* 88. *Evans and Aprichard.* Hal. MSS. See *Aprice's case*, 2. *Leon.* 40. 3. *Leon.* 241. which seems to be the case referred to by lord Coke and lord Hale. The anonymous case in 1. *Leon.* 290. and 3. *Leon.* 121. seems also to be the same case.

(5) 28. *E. 3.* 96. *Grantee has the privilege.* Hal. MSS. But see the reasons for the judgment cited by lord Coke in the books cited in note 4.

(6) *Quære if punishable for waste.* Hal. MSS. See 2. *Inst.* 302.

wife are tenants in speciall taile executed (7), and after they have issue a sonne, in this case they are become tenants for life, the remainder to the sonne in taile, the remainder to them in speciall taile (8); for albeit their estate taile is turned to an estate for life, yet they have but a bare estate for life; but if the issue die, and the husband die having no other issue, and then the sonne die without issue, the wife shall have the priviledges belonging to a tenant in taile after possibility of issue extinct, as it appeareth in *Lewes Bowles*' case *ubi supra*, where it is said, that the state of this tenant must be created by the act of God, and not by limitation of the party, *ex dispositione legis*, and not *ex provisione hominis* [d]. If land be given to a man and to his wife, and to the heires of their two bodies, and after they are divorced *causâ præcontractûs*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them, yet for that the estate is altered by their owne act, and not by the act of God, viz. by the death of either party without issue, they are not tenants in taile after possibility of issue extinct (1). Lands are given to the husband and wife, and to the heires of the body of the husband, the remainder to the husband and wife, and to the heires of their two bodies begotten; the husband dies without issue; the wife shall not be tenant in taile after possibility, for the remainder in speciall taile was utterly void, for that it could never take effect; for so long as the husband should have issue, it should inherit by force of the generall taile, and if the husband die without issue, then the speciall estate taile cannot take effect, in as much as the issue, which should inherit the especiall, must be begotten by the husband, and so the generall, which is larger and greater, hath frustrated the especiall which is lesser. And the wife in that case shall be punished for waste.

Sect. 34.

ET nota, que nul poit estre tenant en le taile apres possibility d'issue extinct, forsque un des donees, ou le donee en le special taile. Car le donee en general taile ne poit estre unque dit tenant en taile apres possibility d'issue extinct; pur ceo que tous temps durant sa vie, il poit per possibility aver issue que poit inheriter per force de mesme le taile. Et issint en mesme le manere l'issue, que est heire a les donees en un especial taile, ne poit estre dit tenant en taile apres possibilitie d'issue extinct, causâ quâ supra.

AND note, that none can be tenant in taile after possibility of issue extinct, but one of the donees, or the donee in especial taile. For the donee in generall taile cannot be said to be tenant in taile after possibility of issue extinct; because alwaies during his life, he may by possibility have issue which may inherit by force of the same entaile. And so in the same manner the issue, which is heir to the donees in especiall taile, cannot be tenant in taile after possibility of issue extinct, for the reason above-said.

Et

And

(7) [See Note 159.]
 (8) [See Note 160.]

[28. b.]
 (1) [See Note 161.]

[d] 7. H. 4. 16.
 8. E. 1. Aff. 415.
 12. Aff. 22.
 19. Aff. p. 2.
 13. E. 3.
 Aff. 91. in fine.
 (9. Co. 140, 141.
 7. Co. 42. b.
 Kenne's case,
 and 4. Co. 29.)

(1. Ro. Abr.
 841.)

[28. b.]

* Et nota, que tenant en taile apres possibilitie d'issue extinct ne serra unque puny de wast, pur l'enheritance que fuit un foits en luy, 10. H. 6. 1. Mes cestuy en le reversion poit entrer s'il alien en fee, 45. E. 3. 22.

And note, that tenant in taile after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him, 10. H. 6. 1. But he in the reversion may enter if he alien in fee, 45. E. 3. 22.

IF lands be given to a man with a woman in frankmarriage, albeit the woman (which was the cause of the gift) dieth without issue, yet the husband shall be tenant in taile apres possibilitie, &c. for that he and his wife were donees in especiall taile, and so within the words of Littleton. The residue of this Section is evident.

* This, and that which follows, is not in the first (2) edition (Dr. and Stud. (which I have). And therefore (that I may speake it once for 61. 11. Co. 80.) all), it was wrong to the authour to adde any thing (especially in one context) to his worke.

TENANT per la curtesie d'Engleterre est, lou home prent feme seisie en fee simple ou en fee taile general, ou seisie come heire de le taile special, et ad issue per mesme la feme male ou female oyes ou vife (1), soit l'issue apres mort ou en vie, si la feme devie, le baron tiendra la terre durant sa vie per la ley d'Engleterre. Et est appel tenant per le curtesie d'Engleterre pur ceo que ceo est use en nul autre realme forsque tantsolement en Engleterre.

Et ascuns ont dit, que il ne serra tenant per le curtesie, si non que l'enfant, qu'il ad per sa feme, soit oye crie; car per le crie est prove, que le enfant fuit nee vife: Ideo Quære (2).

TENANT by the curtesie of England is, where a man taketh a wife seised in fee simple or in fee taile general, or seised as heir in taile especial, and hath issue by the same wife male or female borne alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.

And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the child was borne alive. Therefore Quære.

“PRIST

(2) By the first edition, lord Coke means that printed at Roban, as appears by the preface to this his Commentary on Littleton. But the edition of Lettou and Machlinia, which was really the first, is also without the addition here mentioned. It appears to have been first introduced into the edition by Redman.—See further as to the subject of *tenant in tail after possibility*, Vin. Abr. Tayle I,

(1) Instead of *oyes ou vife*, the words are *neez vif* in L. and M. This latter reading is conformable to lord Coke's translation.

(2) This *quære* is in L. and M. but not in Reh.

Lib. I. Cap. 4. Of the Curtesie d'Engleterre. Sect. 35.

"*P*RIST feme seifie." And first of what seisin a man shall be tenant by the curtesie. [e] There is in law a twofold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said Sect. 468, and 681. And here *Littleton* intendeth a seisin in deed, if it may be attained unto. [f] As if a man dieth seised of lands in fee simple or fee taile generall, and these lands descend to his daughter, and she taketh a husband and hath issue, and dyeth before any entry, the husband shall not be tenant by the curtesie, and yet in this case she had a seisin in law; but if she or her husband had during her life entred, he should have been tenant by the curtesie (3). [g] A man seised of an advowson (4) or rent in fee hath issue a daughter, who is married, and hath issue, and dyeth seised, the wife, before the rent became due or the church became voyd, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any other seisin. *Et impotentia excusat legem* (5). But a man shall not be tenant by the curtesie of a bare right, title, use (6), or of a reversion (7) or remainder expectant upon any estate of freehold, unlessse the particular estate be determined or ended during the coverture.

At the coronation of king R. 2. saith the record, [b] *Johannes rex Castiliæ et Legionis, Dux Lancastriæ, coram dicto domino rege et consilio suo comparens, clamavit ut comes Leicestriæ officium Seneschalciæ Angliæ, et ut dux Lancastriæ ad gerendum principalem gladium domini regis vocat' Curtana die coronationis ejusdem regis, et ut comes Lincoln' ad sciendum et secandum coram ipso domino rege sedente ad mensam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de consilio regis de præmissis, satis constabat eidem consilio, quod ad ipsum ducem tanquam tenentem per legem Angliæ post mortem Blanchiæ quondam uxoris suæ pertinuit officia prædict' prout superius clamabat exercere, consideratum fuit per ipsum regem et consilium suum prædictum quod idem dux officia prædicta per se et sufficientes deputatos suos faceret, et exerceret, et feoda debita in hac parte obtineret. Qui quidem dux officium Seneschalciæ prædict' personaliter adimplevit, &c.* And every man that claimed to hold by grand serjanty to do any service to the king at his coronation, exhibited his petition to the said duke as steward of England, who upon hearing the proofes either allowed or disallowed the same.

In letters patents made by king H. 6. to Richard earle of Salisbury you shall finde this clause, *Quod charissimus consanguineus noster Richardus, nunc comes Sarum, qui Aliciam filiam et hæredem Thomæ nuper comitis Sarum adhuc superstitem duxit in uxorem, et cum eadem Aliciâ prolem tempore mortis prædictæ Thomæ habuit et habet superstitem de præsentî, eoq; pretextû idem Richardus nunc comes Sarum nomen statum et honorem comitis Sarum, &c. habet, et pro tempore vitæ suæ de jure pretextû præmissorum habere debet* (1). The name of the issue which the said Richard earl of Salisbury had by the said Alice was Richard, who married with Anne the sîster and heire of Henry Beauchampe earle of Warwicke, who was earle of Warwicke to him and to his heires, and duke of Warwicke to him and to the heires

§

(3) [See Note 162.]

(4) [See Note 163.]

(5) [See Note 164.]

(6) [See Note 165.]

(7) [See Note 166.]

[29. b.]

(1) [See Note 167.]

[29. b.]

males of his body. And *Richard* the sonne having then no issue by his wife, king *H. 6.* in 27. yeare of his raigne granted to him that he should be earle of *Warwicke*, *licet ipse et prædicta Anna exitum inter eos ad præsens non habent.* These and many more I have read concerning this matter, and only say to the reader, *Utere tuo iudicio, nihil enim impedio.*

[i] If an estate of freehold in feignories, rents, commons, or such like be suspended, a man shall not be tenant by the curtesie; but if the suspension be but for yeares, he shall be tenant by the curtesie. As if a tenant make a lease for life of the tenancie to the feignioresse, who taketh a husband, and hath issue, the wife dieth, he shall not be tenant by the curtesie (2), but if the lease had been made but for yeares he shall be tenant by the curtesie.

[i] Vid. 1.E.3.6.
5. E. 3. 26.
(Post. 30.)

“*En fee simple ou en fee taile generall, ou seisie come beire de la taile speciall, et ad issue per la feme male ou female.*” 2. Of what estate.

If lands be given to a woman and to the heires males of her body, she taketh a husband and hath issue a daughter and dieth, he shall not be tenant by the curtesie; because the daughter by no possibilitie could inherite the mother's estate in the land; and therefore where *Littleton* saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. *Littleton* himself explaneth this by expresse words (1) Cap. Dower fo. 40. Sect. 52. And therefore if a woman tenant in taile generall maketh a feoffment in fee, and taketh back an estate in fee, and take a husband and hath issue, and the wife dieth, the issue may in a *formedon* recover the land against his father, because he is to recover by force of the estate taile as heir to his mother, and is not inheritable to his father (3).

W. 2. ca. 1.
Litt. ca. Dower
fol. 40. sect. 52.
Paine's case
8. Co. fol. 34.

“*Et ad issue.*” 3. The time of having the issue. 4. What kinde of issue. If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he [a] shall be tenant by the curtesie, albeit the issue was had before the wife was seised. And so it is albeit the issue had dyed in the life-time of her father before any descent of the land, yet shall he be tenant by the curtesie (4). If a woman [b] seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dieth, and the childe is ripped out of her body alive, yet shall he not be tenant by the curtesie, because the childe was not borne during the marriage, nor in the life of the wife, but in the meane time her land descended, and in pleading he must alledge, that he had issue during the marriage.

[a] Old Tenures
21. H. 3. tit.
dower 198.

[b] Vide Paine's
case, ubi supra.

If the wife be [c] delivered of a monster, which hath not the shape of mankinde, this is no issue in the law; but although the issue hath some deformity in any part of his body, yet if he hath humane shape this sufficeth. *Hi, qui contra formam humani generis converso more procreantur, (ui si mulier monstrosus vel prodigiosus fuerit enixa) inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen superabundanter, ut si sex digitos vel nisi quatuor habuerit, bene debet inter liberos commemorari. Si inutilia natura reddidit membra, ut si curvus fuerit aut gibbosus vel membra tortuosa*

[c] Brañ. lib. 5.
437, 438.
Britt. ca. 66.
and ca. 83.
Fleta, lib. 1.
ca. 5. and lib. 6.
cap. 54.
(Ante 3. b.
7. b. 8. a.)

(2) [See Note 168.]

(3) [See Note 169.]

(4) Yet in some cases the time of having issue is of consequence. See post. 40.

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tortuosa habuerit, non tamen est partus monstrosus. Item puerorum alii sunt masculi, alii fœminæ, alii hermaphroditæ. Hermaphrodita tam masculo quàm fœminæ comparatur secundum prævalescentiam sexûs incalſecentis.

If the issue be born deaf or dumbe or both, or be born an ideot, yet it is a lawful issue to make the husband tenant by the curtesie and to inherit the land.

[d] 28. H. 8.
25. Dyer.
Paine's case, ubi
supra.

"Oyes ou vive." If it be borne alive [d] it is sufficient, though it be not heard cry; for peradventure it may be born dumbe. And this is resolved cleerly in Paine's case *ubi supra*. For the pleading (as hath beene said) is, that during the marriage he had issue by his wife, and upon that point the triall is to be had, and upon the evidence (5) it must be proved, that the issue was alive, ~~for mortuus exitus non est exitus~~, so as the crying is but a prooffe that the childe was born alive, and so is motion, stirring, and the like. And it is said by an ancient author [e] that it was ordained in the raigne of king H. 1. *Que tous que jurvequissent leur fems dount ills ussent conceive tenuissent les heritages leur fems pur leur vies.*

[30. a.]

[e] Mirror, cap.
1. sect. 3.

[f] 9. E. 3. 38.
16. E. 3. aid.
129. Stat. de
Consuetudinibus
Kancie.

By the custom of Gavelkind [f] a man may be tenant by the curtesie without having of any issue (1).

[g] 21. H. 3.
tit. Dower 198.
Paine's case, ubi
supra.
(1. Leon. 167.)

"Soit l'issue apres mort ou en vie." And therefore [g] if a woman tenant in taile generall taketh a husband, and hath issue, which issue dyeth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesie, albeit the estate in taile be determined, because he was intituled to be tenant *per legem Angliæ* before the estate in taile was spent, and for that the land remaineth. But if a woman maketh a gift in taile, and reserve a rent to her and to her heires, and the donor taketh husband and hath issue, and the donee dieth without issue, the wife dieth, the husband shall not be tenant by the curtesie of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth.

(Post. 32. a.)
[h] Brooke tit.
per le Curtesie
36. 10. E. 3. 27.

But [h] if a man be seised in fee of a rent and maketh a gift in taile generall to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesie of the rent, because the rent remaineth (2). The diversity appeareth.

"Si la feme devie, le baron tiendra a la terre, &c." Four things doe belong to an estate of tenancy by the curtesie, viz. marriage, seisin of the wife, issue, and death of the wife. But it is not requisite that these should concur together all at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesie. So if he hath issue which dieth before the descent, as is aforesaid. ~~for the running of the statute~~

And albeit the state be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

First, after issue had, he shall doe homage alone, and is become tenant to the lord, and the avowrie shall be made onely upon the husband

(5) [See Note 170.]

(1) [See Note 171.]

(2) [See Note 172.]

husband in the life of the wife, as shall be said hereafter when we come to the apt place (3). Secondly, if after issue [i] the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heire of the wife shall not during his life recover it in *jur cui in vita*; for it could not be a forfeiture, for that the estate at the time of the feoffment, was an estate of tenancy by the curtesie initiate (4) and not consummate. And it is adjudged in 29. E. 3. that the tenant by the curtesie cannot claime by a devise, and waive the state of his tenancy by the curtesie, because, saith the booke, the freehold commenced in him before the devise for terme of his life.

(6. Co. 57. b. Post. 67. a. 124. b.)
[i] 34. E. 2. Cui in vita 13.
2. E. 2. Cui in vita 26.
10. E. 3. 12. Dier 21. Eliz. 363.
29. E. 3. fo. 27.

“ *Et est appel tenant per le curtesie d'Engleterre, pur ceo que n'est use en auter realme forsque tantsolement en Engleterre.*”

“ *Per le curtesie.*” In Latine *per legem Angliæ*.

“ *Tantsolement en Engleterre.*” It is also used within the realme of Scotland, and there it is called *Curialitas Scotiæ*. And so it is in the realme of Ireland (5).

“ *Et ascuns out dit, que il ne serra tenant per le curtesie, sinon que l'enfant que il ad per sa feme soit oye crie, car per le crie est prove que le enfant fuit nee wife.*” Our author having delivered his owne opinion before, viz. *oyes ou wife*, now he sheweth the opinions of others: for so is said in the [k] statute *De tenentibus per legem Angliæ*: and of that opinion is *Glanvill* [l] lib. 7. cap. 8. *Bracton* lib. 5. tract. 5. cap. 30. *Britton* cap. 50. fol. 132. *Fleta* lib. 6. cap. 50, &c. But the reason is against their opinion; for by the cry it is proved, &c. so as it is but an evidence to prove the life of the enfant.

(8. Co. 34.)

[k] Vet. Mag. Car. part. 2. fol. 70.
[l] Glanvill. lib. 7. cap. 8. Bra. lib. 5. tract. 5. ca. 30. Britton, cap. 50. fo. 132. Fleta, lib. 6. cap. 54.

“ *Ascuns out dit.*” By these and the like speeches our author intendeth, that the point had been controverted, but thereby, except it be in this Section, where formerly he delivered his opinion, as hath been said, he tacitely insinuateth his owne judgement, which in all the rest holdeth for good law and warranted by good authority throughout his three bookes; which kinde of speech and the like I have collected together, as it appeareth by the Sections in [m] the margin.

[m] Sect. 40. 119. 132. 136, 137, 138 141.

145. 148. 156. 170. 179. 192. 202. 227. 234. 269. 336 339. 357. 400. 435. 436. 440. 443. 460. 462. 478. 501. 503. 506. 522, 523, 524. 534. 576. 601. 633, 634. 640. 642, 643, 644. 646. 658. 675. 689. 721. 723. 726. 730, 731. 733, 734.

“ *Ideo quære.*” This quære is not in the originall edition of *Littleton*, and therefore to be rejected (6).

And some have said, that in divers cases a man shall by having of issue be tenant by the curtesie where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heires of their two bodies begotten, and one of them take

(2. Ro. Abr. 90. & Post. 183. contra.)

(3) Hic sect. 90. 21. E. 3. 35. Hal. MSS.

(4) [See Note 173.]

(5) [See Note 174.]

(6) It appears by the various reading

already given, that this quære, though not in the *Roban* edition, which lord Coke thought the oldest, is in that by *Letton* and *Marblynia*, which is really the original one. [But see *Editor's preface to the present Edition.*]

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7. E. 3. 6.
[n] 17. E. 3. 51.

Prærog. Regis,
ca. 13.

33. E. 3. tit.
Travers 36.
(4. Co. 55.
1. Leon. 47.)

[n] Pl. Com.
Dame Hale's
case 263.

(9. Co. 129.)

[o] Magna Carta
30. E. 1. Dower
81. 17. H. 3.
Dower. Bract.
lib. 2. fol. 46.
& 314.

(Post. 32. a.
Cro. Cha. 300.
1. Ro. Abr.
675.)

[p] 4. H. 3.
dower 180.
Bract. fol. 93.
Fleta, lib. 5. 1

cap. 23.
2. E. 2. dower
123. 3. E. 3.
dower 102.

9. H. 7. 1.
30. E. 3.
(Hob. 338.
Post. 278.)

take husband and have issue and die, the inheritances being severall the husband shall be tenant by the curtesie, as it is adjudged 7. E. 3. and in other bookes [n] this judgment is cited and allowed. But certaine it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, she shall not be endowed, for no estate in the land is altered by that marriage. But I leave the reader to his owne opinion, or rather to suspend it untill he come to a proper place in the next chapter. If lands holden of the king by knights service *in capite* descend to a woman, and after office found she intrude and taketh husband and hath issue, in this case the husband shall be tenant by the curtesie (1); and yet if the heire male after office in the like case intrudeth and taketh wife, his wife shall not be endowed, for so it is provided by the statute of *Prærogativa Regis*, cap. 13. that in that case there accrues to the heire no freehold, nor dower to the wife, which by interpretation is as much as to say, that the heire shall have no freehold as to this respect to give any dower to his wife. If a man marry the niece of the king by licence and hath issue by her, and after lands descend to the niece and the husband enter, the niece dieth, he shall be tenant by the curtesie of this land, and the king upon any office found shall not evict it from him, because by the marriage the niece was enfranchised during the coverture. But if a free woman marry the villaine of the king by licence, and lands descend to the villaine, the villaine dieth, the wife shall not be endowed, but upon an office found the king shall have the land, for the villaine remained still a villaine to the king. A woman [n] taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an idiot by office, the lands shall be seised by the king (2), for the title of the tenancy by the curtesie and of the king begin at one instant, and the title of the king shall be preferred. A man shall be tenant by the curtesie of a castle [o] which serveth for the publicke defence of the realme, but a woman shall not be endowed thereof, as shall be said more at large hereafter (3).

A man shall be tenant by the curtesie of a common *sauns nombre*, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be tenant by the curtesie [p] of a house that is *Caput Baronie* or *Comitatûs*: (4) but it appeareth by 4. H. 3. Dower 180. that a woman shall not be endowed of it. For the law respecteth honour and order. A man is entitled to be tenant by the curtesie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be tenant by the curtesie, because albeit the state given by the feoffment be conditionall, yet his title to be tenant by the curtesie was inclusively absolutely extinct by the feoffment, for the condition was not annexed to it (5). As if the lord disseise the tenant, and maketh a feoffment in fee of the land upon condition, and entreth for the condition broken, yet the feigniori is extinct, for that was inclusively extinct by the feoffment. See more of tenant by curtesie; Section 52 (6).

(1) 1. H. 7. 17. Dy. 95. Hal. MSS.

(2) [See Note 175.]

(3) See post 31. b.

(4) [See Note 176.]

(5) Hic fol 266. Hal. MSS.

(6) See also Wright's Ten. 193. and Vin. Abr. *Curtesy*, and the same title New Abr.

TENANT en dower est, lou home est seisie de certaine terres ou tenements en fee simple, taile generall, ou come heire de le taile speciall, et prent feme, et devie, la feme apres le deceffe de la baron serra endow de la tierce part de tiels terres et tenements, que fueront a sa baron en ascun temps durant le couverture, a aver et tener a mesme la feme en severaltie per metes et bounds pur terme de sa vie, le quel el avoit issue per sa baron ou nemy, et de quel age que la feme soit, issint que el passe l'age de neuf ans al temps de le mort sa baron, [car il covient que el soit passe l'age de neuf ans al temps del mort sa baron,] (1) ou auterment el ne serra my endow.

TENANT in dower is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, for she must be above nine yeares old at the time of the decease of her husband, otherwise she shall not be endowed.

“**T**ENANT en dower” (7), *Tenens in dote*. *Dos*, dower, in the common law [q] is taken for that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of herselfe, and the nurture and education of her children (8). *Propter onus matrimonii, et ad sustentationem uxoris et educationem liberorum cum fuerint procreati si vir præmoriatur: et hoc proprie dicitur dos mulieris secundum consuetudinem Anglicanam*. And *dos* is derived *ex donatione*, et est quasi donarium, because either the law itselfe doth (without any gift) or the husband himself giveth it to her, as shall be said hereafter. And at this day *dos* or dower is not taken by the professors of the common law, either for the land which the wife bringeth with her in marriage to her husband, for then it is either called in frankmarriage or in marriage, as hath beene said, nor for the portion of money or other goods or chattels which she bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time [r] *dos mulieris*, the dower or dowrie of the woman was also applyed to them. But it is commonly taken for her third part, which she hath of her husband's lands or tenements.

In Domesday, *Dos* is called *Maritagium*.

To the consummation of this dower three things are necessary; viz. marriage, seisin, and the death of her husband.

Dos [s], the very name doth import a freedome, for the law doth give her therewith many freedoms. *Secundum consuetudinem regni mulieres viduæ, &c. debent esse quietæ de tallagiis, &c.* And tenant

[q] Lib. Rub. cap. 70.
Glanvill. lib. 6. cap. 1.
Bract. lib. 2. fol. 92.
Britt. cap. 101.
Fleta, lib. 5. cap. 22.

[r] Britton, cap. 101.
Bracton, lib. 2. fo. 92.
Glanv. lib. 6. ca. 1. lib. 7. ca. 1. 2. Co. 93.
Bingham's case. 4. H. 3. dower 179.

[s] Claus. 11. H. 3. nu. 17.
Regist. 142, 143.
F. N. B. 150.
Cokham fol. 40.

(7) [See Note 177.]

(8) [See Note 178.]

(1) All between the brackets omitted in L. and M. and in Roh.

nant in dower shall not be distreyned for the debt due to the king by the husband in his life time in the lands which she held in dower. And other priviledges she hath; of all which *Ockam* yeelds the reason, *Doti ejus parcatur quia præmium pudoris est* (2).

[t] Braët. fol.
298. 19. E. 2.
dower 171.
Dame Hales'
case. 13. E. 3.
dower Statham.
13. E. 1. tit.
Dower.
(Post. 392. b.)

"*Lou home.*" If the husband be an alien [t] the wife shall not be endowed. So if the husband be the king's villaine, the wife shall not be endowed (as hath beene said); but if the husband be a villaine to a common person, the wife shall be endowed if she be intituled to dower before the entrie of the lord. And so if a free man take a niese to wife and dieth, she shall be endowed. The wife of an ideot (3), *non compos mentis*, outlawed, or attainted of felony or trespassse, attainted of heresie, *præmunire*, or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower, she shall not be endowed, as shall be said hereafter.

(Ante 29. a.)

43. E. 3. 32.
45. E. 3. 13.
9. E. 3. 4.
F. N. B. 149.
8. E. 3. tit.
Ass. 393.
19. E. 2.
dower 170.
23. E. 3.
dower 30.
(Perk. sect. 315,
316. 4. Co. 122.
1. Ro. Abr.
677.)

[w] 5. E. 3. tit.
Voucher 249.
Paris's case
9. E. 3. 4.

(4. Co. 122.)

"*Seisfe.*" Here this word (seised) extendeth it selfe as well to a seisin in law, or a civill seisin, as to a seisin in deed, which is a natural seisin: but seised he must be either the one way or the other during (4) the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entry, he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actuall possession, for it lieth not in the power of the wife to bring it to an actuall seisin, as the husband may do of his wife's land, when he is to be tenant by curtesie, which is worthy the observation. And yet of every seisin in law, or actuall seisin of lands or tenements, a woman shall not be endowed. For example, if there be grandfather, father, and sonne, and the grandfather is seised of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowerable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed onely of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actuall) is defeated (5), and now upon the matter the father had but a reversion expectant upon a freehold, and in that case, *Dos de dote peti non debet*; although the wife of the grandfather dieth living the father's wife (6). And here note a diversity [w] betweene a descent and a purchase. For in the case aforesaid, if the grandfather had infeoffed the father, or made a gift in taile unto him, there in the case abovesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother, and the reason of this diversitie is, for that the seisin, that descended after the decease of the grandfather to the father, is avoyded by the indowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is

not

[31. b.]

(2) [See Note 179.]

(3) See ante 30. b. n. 2.

(4) [See Note 180.]

(5) *Hic sect. 8. 8. E. 3. 13. 8 Ass. 6.*

But by some the heir shall have mortdancester of such seisin. Hal. MSS.

(6) [See Note 181.]

not defeated, but only *quoad* the grandmother, and in that case there shall be *Dos de dote*. And yet there is another diversitie [x] (1) where the wife of the father is first indowed, and where the wife of the grandfather; for in the same case after the decease of the grandfather and father the sonne entreth and indoweth his mother of a third part, against whom the grandmother recovereth a third part and dyeth, the mother shall enter againe into the land recovered by the grandmother, because she had in it an estate for terme of her life, and the estate for the life of the grandmother is lesser in the eye of the law, as to her then her owne life. Also the husband [y] (2) may be seised in his demesne, as of fee absolutely, yet the woman shall not be indowed, as she shall not be indowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be indowed of which she will.

(2) Also of a feisin for an instant a woman shall not be indowed (3); as if *Cestuy que use* [z] after the statute of 1. R. 3. and before the statute of 27. H. 8. had made a feoffment in fee, his wife should not be indowed (3 a).

(3) Likewise if two joyntenants be in fee, and the one maketh a feoffment in fee, his wife shall not be indowed (4) (4) And so if the conusee of a fine doth grant and render the land to the conusor, the wife of the conusee shall not be indowed, for it is not possible that the husband could have indowed his wife of such an estate, as the usual pleading is, *Lib. Intrat. 225. Quia dicit quod W. quondam vir suus nunquam fuit seistus de tenementis prædictis de tali statu ita quod eandem A. inde dotasse potuit.*

“*Des terres ou tenements.*” Of a castle that is maintained for the necessary defence of the realme a woman shall not be indowed, because it ought not to be divided, and the publique shall be preferred before the private (5). But of a castle that is onely maintained for the private use and habitation of the owner, a woman shall be indowed. And so it was adjudged in the court of [a] common pleas, where in a writ of dower the demand was, *de tertiâ parte Castri de Hilderker in Comitatu Northumb.* And the statute of *Magna Charta*, cap. 7. whereby it is provided, *nisi domus illa sit Castrum*, is to be understood, a castle maintained for the necessary and publike defence of the realme. And this agreeth with ancient records, [b] (albeit in the argument of the said case they were not vouched) the effect whereof be, *Non debent mulieribus assignari in dotem castra quæ fuerunt virorum suorum et quæ de guerra existunt, vel etiam homagia et servitia aliquorum de guerra existentia.* Wherein it is to be observed, that the law is not satisfied with the names of things, or nominatives, but with things reall and substantial. But of the principal mansion, or capitall messuage, the wife shall be indowed, [c] *si non*

Esch. 4. E. 1. nu. 88.
in Com. Banco.

[c] Bract. l. 2. f. 93.

Brit. c. 103.

Flet. lib. 5. ca. 23.

Trin. 17. El.

(1) 8. E. 2. *Recovery in value* 10. Hal. MSS.

(2) *Hic sect. 56. fol. 42.* Hal. MSS.

(3) [See Note 182.]

(3 a) [See Note 183.]

(4) S. p. acc. in MSS. *Common-Place book*

supposed to be by judge Doderidge, and 14. H. 4. 13. B. and P. 34. E. 1. Fitzh. Dower 178. cited.—See further Cro. Eliz. 502. Noy 64. Cro. Jam. 615. 1. Atk. 442. and 2. Blackst. Comment. 132.

(5) [See Note 184.]

[x] 8. E. 3. tit. Aff. 393.

13. R. 2.

Dower 55.

22. E. 3. 5.

8. E. 3. 3.

7. H. 6. 4.

(Post. 42. a.

4. Co. 122.)

[y] 6. E. 3. 50.

F. N. B. 149.

(Cro. Cha 190,

191. 1. Ro.

Abr. 676. 474.

Cro. Jam. 615.

Doctr. Plac. 148.

2. Co. 77.)

[z] 27. H. 8. 23.

F. N. B.

17. H. 3.

Dower 192.

Vide Sect. 242.

(Post. 165. a.

Ante 30. b.)

[a] Pasch.

23. Eliz. in Com.

Banco. Bract.

fol. 96.

Brit. ca. 103.

Flet. l. 5. c. 23.

30. E. 1. tit.

Dower 81. b.

30. E. 1.

Vouch. 298.

17. H. 3.

Dower 192.

8. H. 3.

Dower 196.

8. H. 3. ib. 194.

[b] Pat. 1. E. 1.

part 1. m. 17.

fit Caput Comitatus, five Baronie (6), for the honour of the realme, or (as hath beene said) a castle for the publique defence of the realme. And so are the old booke to be intended, as it was resolved *Tr. 17. Eliz.* in the court of common pleas, which I heard and observed. And of an estate taile in lands determined, a woman shall be indowed in the like manner and forme as a man shall be tenant by the curtesie, *mutatis mutandis*.

[d] 41. E. 3. 30. 44. E. 3. 26. 30. H. 3. Dyer 41. “*En fee simple, fee taile general, &c.*” If a man be tenant in fee taile generall, [d] and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heires of their two bodies, and they have issue, and the wife dyeth, the husband taketh another wife and dyeth, the wife shall not be indowed, for during the coverture he was seised of an estate taile speciall, and yet the issue which the second wife may have by possibilitie may inherit (7).

30. H. 8. Dyer 41. The same law it is, if in this case he had taken backe an estate in fee simple, and after had taken wife and had issue by her; yet she shall not be indowed, for that the fee simple is vanished by the remitter, and her issue hath the land by force of the entaile. But in that case the tenant cannot plead that the husband was never seised of such an estate whereof the demandant might be indowed, but he must plead the speciall matter (8).

(Doctr. Plac. 148. Post. 33. a.) “*Et prent feme.*” If a man so seised as is aforesaid, taketh an alien to wife, and dyeth, she shall not be indowed (9); but if the king take an alien borne, and dyeth, she shall be indowed by the law of the crowne. And Edmond, the brother of king Edward the first, married the queen of Navarre, and dyed, and it was resolved [e] by all the judges, that she should be indowed of the third part of all the lands whereof her husband was seised in fee (10).

If a Jew born in England taketh to wife a Jew borne also in England, the husband is converted to the Christian faith, purchaseth lands, and infeoffeth another, and dyeth, the wife brought a writ of dower, and was barred of her dower, and the reason yielded in the record [f] is this, *Quia verò contra justitiam est quòd ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione sua noluit cum eo adhærere et cum eo converti* (1). [32. a.]

(1. Ro. Abr. 682.) “*Del tierce part de tiels terres et tenements per severallie per metes et bounds.*” Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing it selfe, yet a woman [g] shall be endowed thereof in a speciall and certaine manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heire, but either she may be endowed of the third tolle dish, or *de integro molendino per quemlibet 3. mensem.* And so of a villeine, [h] either

(Post. 165. a.) [b] 2. H. 6. 11. Bract. lib. 2. fo. 97. Britt. 247. 11. E. 3. tit. Dower 85. 15. E. 3. ibid. 81. 2. E. 3. 57. F. N. B. 8. k.

(6) [See Note 185.]

(7) [See Note 186.]

(8) 21. E. 3. 36. 3. H. 6. 55. Hal. MSS.

(9) [See Note 187.]

(10) Yet Edmund the queen of Navarre's husband was only a subject, therefore *quare* the reason of the case.

[32. a.]

(1) Nota placitum illud fuit coram iusticiariis ad custodiam Judæorum assignatis. Hal. MSS.—See the record at length in *Tov. Angl. Judaic.* 230. See also *Mol. de Jur. Marit.* 8th ed. b. 3. c. 6. f. 11.

either the third dayes work, or everie third weeke or month. A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a faire, of the third part of the profits of the office of marshalle, of the [i] third part of the profits of the keeping of a parke, of the third part of the profit of a dove-house, and likewise of the third part of a piscary, [k] viz. *tertium piscem, vel jactum retis tertium*; of the third presentation to an advowson (2). A writ of dower lieth *de 3. parte exituum provenientium de custodia gaolæ Abathiæ Westm.* And herewith agreeth reverend antiquitie. *De [l] nullo, quod est suâ naturâ indivisibile et sectionem sive divisionem non patitur, nullam partem habebit, sed satisfaciât ei ad valentiam.* Of the third part of profits of courts, [m] fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest indowment of tithes is of the third sheafe; for what land shall be sowne is uncertaine (3).

But in some cases of lands and tenements, which are divisible, and which the heire of the husband shall inherit, yet the wife shall not be endowed. As if the husband [n] maketh a lease for life of certaine lands, reserving a rent to him and his heires, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within this word tenements) because there was no feisin in deed or in law of the freehold nor of the rent, because the husband had but a particular estate therein, and no fee simple (4).

But if the husband maketh a lease for yeares, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the yeares (5). And herewith agreeth the common experience at this day. But if the husband maketh a gift in taile, reserving a rent to him and his heires, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibilitie may continue for ever.

Of a common certaine a woman shall be endowed, but of a common *sauns nombre en grosse* she shall not be endowed; as hath beene said before. And so of a rent service, rent charge, and rent secke, she shall be endowed (6). But of an annuities that chargeth onely the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower they in the eye of the law have continuance.

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time: for her title is to the quantitie of the land, viz. one just third part (7).

And

(2) See post. 32. b. n. 2.

(3) [See Note 188.]

(4) [See Note 189.]

(5) [See Note 190.]

(6) [See Note 191.]

(7) [See Note 192.]

[i] 4. E. 2.

Tr. 233.

26. E. 3. 58.

45. E. 3.

Dower 50.

(Cro. Jam. 621.)

[k] Braçt. 98.

208. Brit. 247.

Flet. lib. 5. ca.

23. 17. E. 2.

Dower 104. 163.

19. E. 3. Quar.

Imp. 154.

7. E. 3. 7.

[l] Braçt. 97.

Brit. 146, 147.

[m] Lib. Intr.

Judgm. 18.

fo. 230.

11. Co. 25, 26.

Harper's case.

[n] 28. Aff. 2.

8. R. 2. 2.

Dower 184.

1. E. 6. Dow. 89.

Vid. 1. E. 6.

Dow. B. 89.

(Ante 30. a.)

(Cro. Cha. 300.

Ante 30. b.

2. Ro. Abr. 675.

Ante 29. b.)

7. Co. 38.

Lillingston's

case.

6. Co. 78. Seig.

Aburganie's

case.

(Post. 56. a.

171. a. 179. a.

Perk. sect. 328.

contra.)

(F. N. B. 149.
C.)
V. 30. E. 1.
Vouch. 298.

And the like law it is if the heire improve the value of the land by building: and on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband (8).

“*Afcuns temps durant le coverture.*” For the better understanding whereof it is to be knowne, that (as hath beene said) to dower three things doe belong, viz. marriage, seisin, and the death of the husband. ⁽¹⁾ Concerning the seisin, it is not necessarie that the same should continue during the coverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage doe continue, for if that be dissolved the dower ceaseth, *ubi nullum matrimonium, ibi nulla dos.* But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c. and not *à mensa et thoro* only, as for adulterie (9). And yet it is said, that if the assignment of dower *ad osium ecclesie* be specified, viz. that notwithstanding any divorce shall happen yet that she shall hold it for life, that this is good.

Braet. 92.
Brit. cap. 101.
Brit. cap. eodem.
(1. Ro. Abr. 681.
Docr. Plac.
148. Post. 33. b.
4. Co. 29.
5. Co. 9. b.)

[o] W. 2. ca. 34.
Lib. Intr. 224.
Fleta, lib. 5.
c. 22. Br. c. 109.
Mirror, ca. 5.
sect. 5.
(F. N. B. 150.
Perk. sect. 354.
1. Ro. Abr. 680.
1. Sid. 118.)
[p] 3. E. 3. 2.
6. E. 3. 29.
9. E. 3. 29.
19. E. 3.
Dower 94.
43. E. 3. 19.
Vid. Fitz. N. B. 150. h. 8. E. 2. Dower 153

If the wife elope [o] from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer (10), she shall lose her dower until her husband willingly without coercion ecclesiasticall be reconciled unto her, and permit her to cohabit with him, all which is comprehended shortly in two hexameters, *Sponsa virum mulier fugiens, et adultera facta, Dote sua careat, nisi sponsa sponte retracta.* And [p] if she goeth willingly with or to the avowtr, this is a departure and a tarrying, albeit she remaineth not continually with the avowtr, or if she tarrieth with him against her will, or if he turne her away, or if she cohabit with her husband, by the censures of the church, in all these cases she loseth her dowrie. But see notable matter hereof in the exposition upon the statute of W. 2. cap. 34.

[32. b.]

[q] M. 2. & 3.
Eliz. Dier 187. b.
10. Ass. p. 2.
17. E. 3. 4.
Tr. 10. H. 5.
Rot. 447.

“*En severaltie per metes et bounds.*” And yet in some cases where the husband was sole seised, the wife shall not be endowed in severalty by metes and bounds (1). As for example, [q] if a man seised of lands in fee took a wife, and infeoffed eight persons, a writ of dower was brought against these eight persons, and two confessed the action, and the other six pleade in barre, and descend to issue, the demandant shall have judgment to recover the third part of two parts of the land, in eight parts to be divided, and after the issue being found for the demandant against the six, the demandant shall have judgement to recover against them the third part of six parts of the same lands, in eight parts to be divided, which is worthie the observacion. But of this more shall be afterwards said in this Chapter.

But regularly Littleton's words are to be intended, where the husband was sole seised, for where he was seised in common, there she cannot be endowed by metes and bounds, as it appeareth in this Chapter,

(8) [See Note 193.]
(9) [See Note 194.]

(10) [See Note 195.]
(1) [See Note 196.]

Chapter, Sect. 44. *Nota*, the endowment by metes and bounds, according to the common right, is more beneficiall to the wife, than to be endowed against common right, for there she shall hold the land charged, in respect of a charge made after her title of dower (2).

“ *Le quel el avoit issue per sa baron ou nemy.*” Herein the tenant in dower, as in many other cases, is preferred before the tenant by the curtesie; but yet this great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same, wherein sometimes great delays are used, and therefore the well advised friends of the wife will provide for a jointure to be made to her, as shall be said hereafter. For by the statute of [r] *Magna Charta*, cap. 7. she shall tarrie in the chiefe house of her husband but by the space of fortie dayes after the death of her husband, within which time dower shall be assigned unto her, unlesse it were formerly assigned, &c. but of little effect was that act, for that no penaltie was thereby provided if it were not done: which terme of 40 days is in law called *Quarentina*. But if she marry within the 40 dayes, she loseth her quarentine (3). But some have said that by the ancient law of *England* the woman should continue a whole yeare in her husband's house, within which time if dower were not assigned, she might recover it: and this certainly was the law of *England* before the Conquest [s], *Mulieres viduæ bis senos menses viduas exigunto, atque tum demum cui velint nubant, sin que ante annum nupserit dote muldata fortunis omnibus à priore marito relictus privatur.* But for the reliefe of the widow it was provided by the statute of *Merton* made Anno 20. H. 3. cap. 1. (which by [t] *Bracton* is called *Nova constitutio*) that the wife shall recover damages in her writ of dower from the time of the death of her husband (4). But herein divers things are observable. First, in what kind of writ of dower she shall recover her damages. In a writ for a dower *ad osium ecclesiæ*, or *ex assensu patris*, she shall recover no damages, because she may enter, and the words of the statute be, *et dotes suas habere non possunt sine placito*. Also I have read in an ancient and learned reading upon this statute, that it extendeth only to a writ of dower, *Unde nihil habet*, and not to a writ of right of dower, for in no writ of right damages are to be recovered. 2. She shall recover damages only when her husband dies seised, (that is) seised of the freehold and inheritance [u], for albeit the husband before the title of dower had made a lease for yeares reserving a rent, the wife shall recover the third part of the reversion with a third part of the rent and damages, for the words of the statute be, *de quibus viri sui obierunt seistiti* (5). 3. Some say that the demandant in a writ of dower, that delayeth herselfe, shall not recover damages, therefore let the demandant take heed thereof. 4. It is necessary for the wife after the decease of her husband as soon as she can to demand her dower before good testimony, for otherwise she may by her owne default lose the value after the decease of her husband and her damages for detaining of her dower. For if she

26. E. 3. Dower
133.
10. E. 3. 31.
17. E. 2. Dower
164. 19. E. 3.
Quar. Imp. 154.
12. E. 4. 2.
18. H. 6. 27.
per Paston.

[r] *Magna Charta*, cap. 7.
Fleta, lib. 5.
cap. 23.
Bracton, lib. 2.
fo. 96.
Britton, ca. 103.
(Post. 34. b.)
19. H. 6. 14.
6. E. 6.
Dyer 76.
F. N. B. 161.
Regist. Orig.
175. 1. Marie
Dower 101.
(2. Inst. 17.
F. N. B. 161. A.)
[s] *Lamb. Sect.*
120. 71. & divers ancient
manuscripts.
See the 2. part
of the Institutes,
cap. 7.
[t] *Bract.* lib. 4.
312. & lib. 2. 96.
Britton, cap. 103.
Fleta, lib. 5.
cap. 23.

(Cro. Jam. 621.
1. Leon. 56.)
[u] *Regist.*
Judic. 4.
Origin. 173.
Dyer 11. El. 284.
Rast. pl. fo.
226, &c.
16. E. 3. tit.
Damages 83.
8. E. 2. ibid. 11.

(2) [See Note 197.]

(3) See further as to *Quarentine* 2. Inst. 17. Barringt. Ant. Stat. 2d ed. p. 9, 10. Hugh. on Orig. Writs 193. and Vin. Abr. Dower I. a.

(4) [See Note 198.]

(5) *Damages in such case according to the value, not of the land, but of the rent.* P. 22. Jac. C. B. Hal. MSS.

(Dr. and Stud.
Dial. 2. c. 13.)

she bring a writ of dower against the heire, and the heire cometh into the court upon the summons the first day, and plead that he hath been always ready and yet is to render dower, &c. if the wife hath not requested her dower, she shall lose the mean values and her damages; but if she hath requested her dower, she may plead it, and issue may be thereupon taken.

[w] 5. E. 3. 1.
41. E. 3.
Dower 46. and
not in the booke
at large.

(Doctr. Plac.
152.)

[x] 16. E. 3.

Dower 59. 2. H. 4. 7. 9. H. 4. 4. tit. issue 133. 11. H. 4. 40. 13. E. 4. 7. 14. H. 8. 25. b.

But it is holden in some bookes [w] that a request *in pays* is not sufficient, and that it is the folly of the wife that she brought not her writ of dower sooner. But the law and many [x] bookes be against it, and the words of the plea (that he hath beene always ready, &c.) prove the same, and the words of the statute also prove this,

et dotes suas habere non possunt sine placito.

(Doctr. Plac.
152.)

And the reason why *tout temps prist* is a good plea in a writ of dower brought against the heire to barre her of the meane values and damages is, because the heire holdeth by title, and doth no wrong till a demand be made (1). But in a writ of aiel, cosinage, &c. where the land and damages are to be recovered, there such a plea is not good; for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heire cannot at the first day plead *tout temps prist*, because he had not the land all the time, since the death of the ancestor. 5. It is to be observed, that the mean values and damages are to be recovered against the tenant in a writ of dower, as it appeareth in a notable record [y] between *Belfeld* and *Rowse* (2). The tenant as to parcell pleaded non-tenure, and for the residue deteynment of charters, upon which pleas they were at issue, and both issues found by the jury against the tenant, and found further that the husband died seised such a day and yeare, and had issue a sonne, and that the demandant and the sonne by 6 yeares together after the decease of the husband tooke the profits of the land, and after the sonne such a day and yeare died without issue, after whose decease the land descended to the tenant as uncle and heire to him, by force whereof he entred and took the profits untill the purchasing of the originall writ, and found the value of the land by the yeare, and assessed damages for the deteyning of the dower, and costs; and upon this verdict, after often debating, the demandant had judgment to recover her dammages for all the time from the death of her husband without any defalcation (3). In which case many things apparent therein are observable. Let the tenant therefore take heed how he plead false pleas. 6. That this statute of *Morton* doth extend to copiholds [z] where the custome is, that women be dowable (4). 7. That if the wife hath dower assigned to her in chancery she shall have no damages [a], for the words of the statute be, *et viduæ per placitum recuperaverint, &c.* So it is if the heire or his feoffee assigne dower, and the wife accepteth it, she loseth her damages. A man seised of lands in fee taketh a wife and granteth a rent charge, and after maketh a feoffment in fee, and taketh backe an estate taile and dieth, the wife recovereth dower against the issue in taile

[33. a.]

(S. C. Mo. 80.
N. Bendl. 153.
4. Leon. 198.)
[y] Mich. 8. &
9. Eliz. Rot.
904. in Comm.
Tanc.
(9. Co. 15. b.
Beddingfield's
case. 1. Ro.
4. pr. 679.)

[z] Tr. 37.
Eliz. 4. Co. 30.
b. Shawe's case.
[a] 43. Aff.
Pl. 32.

(F. N. B. 263.)

14. H. 8. 28.

(1) [See Note 199.]

(2) Mich. 8. and 9. Eliz. Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80 and N. Bendl. 153.

(3) [See Note 200.]

(4) Vid. Rot. Parl. 3. H. 6. n. 29. *special act of parliament for giving mesne values to the wife against the king, in casu comitissæ Marche.* Hal. MSS.

taile by reddition, the wife maketh a surmise that her husband died seised, and prayeth a writ to enquire of the damages, and that is granted to her. In this case she holds the land charged with the rent charge, for by her prayer she accepteth herselfe dowable of the second estate (5) and of the first estate, whereof she was dowable, her husband died not seised, and so she hath concluded herselfe; wherefore if the rent charge be more to her detriment than the damages beneficiall to her, it is good for her in that case to make no such prayer (6).

“*De quel age que la feme soit, issint que el passe l'age de neufe ans*” (7) *al temps del mort son baron.* Feme, wife. Here Littleton speaketh of a wife generally, and generally it is to be understood as well of a wife *de facto*, as *de jure*. Therefore if the wife be past the age of 9 yeares [6] at the time of the death of her husband, she shall be endowed of what age soever her husband be, albeit he were but 4 yeares old. *Quia junior non potest dotem promereri, neque virum sustinere; nec obstabit mulieri petenti minor aetas viri.* Wherein it is to be observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before 12 nor a man before 14, yet this inchoate and imperfect marriage (from the which either of the parties at the age of consent may disagree) after the death of the husband shall give dower to the wife, and therefore it is accounted in law after the death of the husband *legitimum matrimonium*, a lawfull marriage, *quoad dotem*. If a man taketh a wife of the age of 7 yeares, and after alien his land, and after the alienation the wife attaineth to the age of 9 yeares, and after the husband dieth, the wife shall be endowed: for albeit she ~~was not absolutely~~ dowable at the time of her marriage, yet she was conditionally dowable, viz. if she attained to the age of 9 yeares before the death of the husband, for so Littleton here saith, so that she passe the age of 9 yeares at the death of her husband, for by his death the possibility of dower is consummate.

And so it is if the husband alien his land, and then the wife is attainted of felony, now is she disabled, but if she be pardoned before the death of the husband, she shall be indowed. If the son indow his wife at the age of 7 yeares *ex assensu patris*, if she before the death of her husband attain to the age of 9 yeares the dower is good. But otherwise it is of an originall absolute disability; as if a man take an alien to wife, and after the husband alien the land, and after she is made denizen, the husband dieth, she shall not be indowed (8), because her capacity and possibility to be indowed came by the denization. Otherwise it is if she were naturalized by act of parliament, whereof see more in the Chapter of Villenage (9).

And the bishop upon an issue joyned in a writ of dower, *Quod nunquam fuerunt copulati legitimo matrimonio*, ought to certifie that they were coupled in lawfull marriage, albeit the man were under

fourteene,

(1. Ro. Abr. 675. Doctr. Plac. 148.)

[6] 3. E. 1. Dower 172. Itin. North. 8. E. 2. Dower 112. 7. E. 2. Dower 147. 12. E. 2. ib. 159. 21. E. 3. 28. 15. E. 3. Dower 67. 12. R. 2. Dower 54. 12. H. 4. 3. 35. H. 6. 40. 7. H. 6. 11, 12. 12. H. 4. Doctr. & Stud. Fitz. N. B. 149. b. 22. Eliz. Dower 369. Bract. fol. 92. Fleta, lib. 5. ca. 21. Lib. Intrat. fo. 123. (Post. 37. a. Ante 31. Cro. Jam. 539.)

(See 1. Salk. 120. S. C. 3. L20. 410.)

(5) [See Note 201.]

(6) See further as to damages in dower Hugh. on Orig. Wr. 180. Treat. on Dow. in Gilb. Law of Uses 375. 2. L. Raym. 1384. New Abr. Dower I. Vin. Abr. Dower O. a. P. a. Say. Law of Dam. 16. and 17. Ch. 2. c. 8. sect. 3. and 4.

Cas. B. R. temp. Hardw. 19. 50. 23.

(7) Vid. *Rass. Entr.* 228. novem annorum et dimid. *She ought to shew how much more she is than 9 years.*—Hal. MSS.

(8) [See Note 202.]

(9) Vid. *supra* fol. 31. b.—Hal. MSS.—See note 9. in 31. b.

(7. Co. 98. b.
Bernie's case.)

[c] 10. E. 3. 35.
Fleta, lib. 5.
cap. 22. Brit.
cap. 107.
(7. Co. 41. b.)

[d] Bracton,
lib. 4. fol. 304.
Britton, ibidem.
Fleta, lib. 5.
cap. 23. 32. E. 1.
Dier 156.
(5. Co. 98. b.
Ante 32. a.
1. Ro. Abr.
341. 681.
Noy 108.)

[e] Tr. 2. Ja.
Rot. 1815. in
Communi
Banco, inter
Stowell and
Wikes in
Dower.

[f] 50. E. 3.
15. b.

[g] W. 2. cap.
34.
(1. Mod. Rep.
130. 2. Inst. 68.)

[b] Britton,
cap. 106.
Bracton, lib. 4.
fol. 301.
[i] 31. E. 3. tit.
Collusion 29.

[2] Bract. lib. 2.
cap. 39. fol.
92, &c.
Fleta, lib. 5.
cap. 22.
Britton, cap.
101.

fourteene, or the wife above nine, and under twelve (10). So it is if a marriage *de facto* be voidable by divorce (11), in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed à *vinculo matrimonij*, yet if the husband die before any divorce, then, for that it cannot now be avoyded, this wife *de facto* shall be endowed; [c] for this is *legitimum matrimonium* (as in the other case when the wife is *infra annos nubile*) *quoad dotem*. And so in a writ of dower the bishop ought to certifie, that they were *legitimo matrimonio copulati*, according to the words of the writ. And herewith agreeth 10. E. 3. 35. And [d] Bracton: *quamdiu duravit matrimonium, duravit dotis exactio, eo deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam, quod si aliquando fuit matrimonium propter consanguinitatem, &c. inter eos accusatum, nunquam tamen fuit in vita viri sui solum nec divorcium celebratum*. But if they were divorced à *vinculo matrimonij* in the life of her husband, she loseth her dower: otherwise it is if they were divorced [e] *causâ adulterij* (1), which is but à *mensâ et thoro*, and not à *vinculo matrimonij*, as it was adjudged. But some doe hold that a wife *de facto* shall not have an appeale of the death of her husband, but onely she that is a wife *de jure in favorem vitæ* (2). Vide 50. E. 3. fol. 15. 28. E. 3. 92. 27. Aff. Stamf. Pl. Cor. 59. and that there *unques accouple in loyall matrimonie* shall be taken *de jure* strictly. And so in some cases a wife shall have dower where she cannot have an appeale, [f] and in other cases she shall have an appeale where she cannot have a writ of dower; as if she elope (3), &c. she is barred of her dower, but not of her appeale (4): and the reason is, for that the statute [g] barreth her of her dower, but not of her appeale. So if the husband be attainted of treason, &c. his wife shall not be endowed, and yet if any doe kill him, the wife shall have an appeale: the reason of the diversity shall appeare hereafter in this Chapter (5).

“ *Après le mort le baron.*” [b] *Mortuo viro huic confirmatur dos*. This is intended of a naturall, not of a civill death. For if the husband entred in religion, [i] the wife shall not be endowed untill he be naturally dead (6).

And in this Chapter *Littleton* divideth dower into five parts, viz. dower by the common law. Secondly, dower by the custome. Thirdly, dower *ad ostium ecclesiæ*. Fourthly, dower *ex assensu patris*. And fifthly, dower *de la plus beale*. And all these dowers were instituted for a competent livelihood for the wife during her life: [k] *Propter onus matrimonij, et ad sustentationem uxoris et educationem liberorum, cum fuerint procreati, si vir præmoriatur*.

(10) [See Note 203.]

(11) [See Note 204.]

[33. b.]

(1) 10. E. 3. 15. Supra. 32. Hal. MSS. See n. 9. in 32. a.

(2) Acc. 2. Hawk. Pl. C. b. 2. c. 23. f. 36. and the authorities there cited.

(3) To the books cited ante 32. a. n. 10. as to the effect of elopement on dower, add New Abr. tit. Marriage E. 1. Treat. on Dower in Gilb. Law of Uses 402.

(4) Acc. Bro. Appeal 17. Staund. Pl. C. 59. But see contra 2. Inst. 317. and 1. Mod. 130. by judge Hide.

(5) See post. 37. a.

(6) [See Note 205.]

Sect. 37.

ET nota, que per le common ley la feme n'avera pur sa dower forsque la tierce part des tenements que fueront a sa baron durant le espousels; mes per custome d'ascun pais el avera le moitie, et per le custome en ascun ville et burgh, el avera l'entiertie; et en tous tiels cases el serra dit tenant en dower.

AND note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custome of some county, she shall have the halfe, and by the custome in some towne or borough, she shall have the whole; and in all these cases she shall be called tenant in dower.

“NOTA, per le common ley la feme n'avera pur sa dower “forsque [1] la tierce part, &c.” This third part is called *rationabilis dos*, or *dos legitima*, because it is the dower that the common law giveth. *Rationabilis autem dos est cujuslibet mulieris de quocunque tenemento tertia pars omnium terrarum et tenementorum quæ vir suus tenuit in dominio suo ut de feodo, &c.*

[1] Glanv. lib. 6. cap. 1.
Bracton, ubi supra.
Britton, ubi supra.
Fleta, ubi supra.

Mirror, cap. 1. sect. 3. Magna Carta, cap. 7.

“Mes per custome d'ascun pais (7) el avera le moitie, et per le custome en ascun ville et burgh el avera l'entiertie.” Such a [m] custome may extende to a county, city, or an ancient burgh without question; and so this custome, as here it appeareth by *Littleton*, may extend to upland towns, which are neither counties, cities, nor boroughs. But the surer pleading, in this and the like cases, is to lay the custome within a manor or feignory, if the truth of the case will so beare it (8). By the custome of Gavelkind [n] the wife shall be indowed of the moity, so long as she keepe herselfe sole, and without child, which she cannot waive and take her thirds for her life (9). For in that case, *Consuetudo tollit communem legem* (10).

Fitz. N. B. 150. O.
[m] 21. E. 4. 53, 54.
7. H. 6. 26.
22. H. 6. 14.
21. H. 7. 17.
40. Aff. 27. 41.
16. E. 2. Pre-
scription 53.
43. E. 3. 32. 45.
Aff. 8. Dier 363.
39. E. 3. 2. 10.
14. E. 3.

Barre 277. 13. E. 3. tit. Dower 65. (1. Ro. Abr. 558. 563.) [n] Vide le statute de consuetud. Kancie, &c. Trin. 17. E. 3. coram rege Kan. in Theaur. in which record Senentia signifieth Widowhood.

And as custome may enlarge, (11) so may custome abridge dower, and restraine it to a fourth part, &c.

Sect. 38.

[34. a.]

AUXY, sont deux auters manners de dower, c'estascavoir, dower que est appelle dowment ad ostium ecclesiæ, et dower appelle dowment ex assensu patris.

ALSO, there be two other kinds of dower, viz. dower which is called dowment at the church doore, and dower called dowment by the father's assent.

This shall be explained by that which shall be said in the two Sections next ensuing.

(7) [See Note 206.]

(8) Nota, the writ special. Hal. MSS.

(9) See acc. Robins. Gavelk. 159.

(10) [See Note 207.]

(11) [See Note 208.]

Sect. 39.

DOWMENT *ad ostium ecclesiæ* est, lou home de plein age seisié en fee simple que serra espouse a un feme, quant il vient al huis del monastery ou d'esglise d'estre espouse, et la, apres affiance enter eux fait, il endowe la feme de sa entier terre ou de la moity, ou d'autre mendre parcel, et la overiment declare le quantitie et la certainty de la terre que el avera pur sa dower. En ceo case la feme, apres le mort le baron, poit entrer en le dit quantitie de terre dont le baron luy endowe, sans auter assignement de nulluy.

DOWMENT at the church doore is, where a man of full age seised in fee simple who shall be married to a woman, and when he commeth to the church doore to be married, there, after affiance and troth plighted betweene them, he endoweth the woman of his whole land or of the halfe, or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignement of any.

10. H. 3. Dower 200.

[o] Braſton, lib. 2. cap. 39. Mirror, cap. 1. sect. 3. and cap. 5.

10. H. 3. Dower 201. F. N. B. 150. m. n. Fleta, lib. 5. cap. 22, &c. Britton, cap. 101. 108, &c. (Perk. sect. 306.)

IF this dower be made *ad ostium castri sive mesuagii* it is not good, but ought to be made *ad ostium ecclesiæ sive monasterii*.

Et sciendum est, [o] quod hæc constitutio fieri debet in facie ecclesiæ, et ad ostium ecclesiæ; non enim valet facta in lecto mortali, vel in camerâ, vel alibi ubi clandestina fuere conjugia.* For the law requires, that this and like matters be done publickly and solemnly.

9. H. 3. Dower 197. (Post. 38. a. 1. Ro. Abr. 682.)

“Ou home de pleine age.” That is of one and twenty yeares. Anno 9. H. 3. Dower 197. A man of the age of eighteen yeares tooke a wife, and by assent of his guardian endowed her *ad ostium ecclesiæ*, and it was adjudged a good endowment, albeit the husband dyed before the age of one and twentie yeares; but I hold Littleton’s opinion to be good law.

[p] Glanvil. lib. 6. ca. 1. 40. E. 3. 43. Vide Vernon’s case, 4. Co. 1, 2.

“La, apres affiance enter eux.” (1) *Affidare est fidem dare*, affiance or sponsalitie, and is derived of this word *spondeo*, because they contract themselves together; *et ideo sponsalia dicuntur [p] futurarum nuptiarum conventio, et repromissio* (2). But this dower is ever after marriage solemnized (3), and therefore this dower is good without deed, because he cannot make a deed to his wife. For no assignement of dower *ad ostium ecclesiæ* can be made before marriage, for that before marriage the woman is not intituled to have dower.

“De

* Quære, if this should not be read *lecto maritali*. (2) [See Note 210.]
(1) [See Note 209.] (3) [See Note 211.]

[34. b.]

"De sa entier terre ou de la moitie." (4) In ancient time [q] as it appeareth by *Glanvill*, lib. 6. cap. 1. it was taken that a man could not have indowed his wife *ad ostium ecclesiæ* of more than a third part, but of lesse he might. But at this day [r] the law is taken as *Littleton* here holdeth. An assignement of dower, [s] where the husband was sole seised, cannot be made of the third or fourth part in common, but ought to be in severaltie (1).

Fleta, l' b. 5. cap. 22, &c. (1. Ro. Abr. 682.) [r] F. N. B. 150.
Barre 132. 45. E. 3. 6. Fleta, lib. 5. 23.

[q] *Glanvill*.
lib. 6. cap. 1.
Bract. lib. 2.
cap. 38, 39.
and lib. 4.
tract. 6
cap. 1. & 6.
Britton, cap.
101, &c.
[s] 20. E. 3.

"Et la overtment [t] declare le quantitie et certaintie del terre." Here be two things that the law doth delight in, viz. first to have this and the like openly and solemnly done. Secondly, to have certaintie, which is the mother of quiet and repose. And this word (moitie) abovesaid is to be entended of the halfe in certaintie, and not of the moitie in common, which cleerly [u] appeareth in that here *Littleton* saith, the quantitie and certaintie of the land.

[t] Britton,
cap. 101.
Bracton, lib. 2.
cap. 18.

[u] Vide 14. H.
3 Dower 189.
9 H. 3.
40. E. 3. 43.

Dower 190. 8. H. 3. Dower 195. F. N. B. 150.

"En ceo case la feme poet entrer en le dit quantitie del terre." And afterwards *Sectione* 43. he saith, *Nota, que en tous casés lou le certaintie appiert, queux terres ou tenements feme avera pur sa dower, la feme poet entrer apres le mort son baron.* It was instituted in favour and reliefe of wives, that a man after marriage might assigne to his wife certaintie of dower, to the end that the widow should not be driven to a long and chargeable suit wherein delay might be used, and in the meane time her life spent, together with her money also. For albeit the [w] law hath provided, *quod vidua post mortem mariti sui non det aliquid pro dote sua, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui, infra quos dies assignetur ei dos sua, nisi prius ei assignata fuerit, &c. et habeat rationabile estoverium suum interim in communi*, yet because there was no penaltie or punishment inflicted, the tenant of the land may drive her to sue for her dower. And this continuance of the widow in the capitall messuage, is in law called a quarentine, *quarentina*, for that it is by the space of fortie days, as is aforesaid (2). And if the heire or other tenant of the land put her out, she may have her writ *De quarentinâ habendâ*. If the wife marry within the fortie dayes she loseth her quarentine, for her habitation in the house is personall to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be generall. And therefore to the end that widowes might have certaintie of estate, and that they might enter (3) and not be driven to suit, the law hath provided dower *ad ostium ecclesiæ*, and, as it shall appeare hereafter, dower *ex assensu patris*. And lastly, by making of a joyniture, of which (being no dower but made in satisfaction of dower either before or after marriage) it is necessary that something should be said hereafter in his apt place, for that this now falleth out to be the surest way.

[w] *Magna Carta*, cap. 7.
See the Second Part of the Institutes, cap. 7.
Fleta, lib. 5. cap. 23. Britton, cap. 103.
Bract. lib. 2. cap. 40.
Regist. 175.
Vide Dyer 6. E. 6. 76. b. and 161. a.
F. N. B. 161.
1. Marie.
Br. 101.
(Ante 32. b.)

Nota, surest way.

"En tous casés quant le certaintie appiert, &c. la feme poet entrer apres le mort del baron." This is to be intended where the certaintie appeareth upon an assignement of dower *ad ostium ecclesiæ*, or *ex assensu patris*. For if a woman bring a writ of dower of fixe pound rent.

(1. Ro. Abr. 681.
2. Inst. 678.
32. H. 8. cap. 5.
of execution.)

(4) [See Note 212.]

(2) See further as to *quarentine* ante 32. a. and n. 3. there, and Treat. on Dow. in Gilb. Law of Uses, 372.

[34. b.]

(1) [See Note 213.]

(3) [See Note 214.]

[x] 45. E. 3. 26.
48. E. 3. 36.
22. Aff. 87.
39. E. 2. 12.
37. H. 6. 38.
39. H. 6. 25.
1. H. 5. 8.
Brev. 199.
30. E. 3. 30.
21. E. 4. 3.
Vide 1. Co.
Shelley's case.
40. E. 3. 22.

rent charge, and she hath judgement to recover the third part, albeit it be certain that she shall have fortie shillings, yet she cannot [x] distreine for 40 shillings, before the sherife doe deliver the same unto her: (4) for wheresoever the writ demands land, rent, or other things in certain, the demandant after judgement may enter or distrein before any seisin delivered to him by the sherife upon a writ of *habere facias seisinam*. But in dower where the writ demandeth nothing in certaine, there the demandant after the judgement cannot enter or distreine untill execution sued, by which execution the sherife is by the king's writ to deliver the third part in certaintie to the demandant. And so it is when the wife of one tenant in common demands a third part of a moitie, yet after judgement she cannot enter untill the sherife deliver to her the third part, albeit the deliverie of the sherife shall reduce it to no more certaintie then it was (5).

“*Sauns auter assignement (6) de nulluy.*” For as concerning dower at the common law, there must be assignement either by the sherife, (as hath been said) by the king's writ, or else by the heire or other tenant of the land by consent and agreement between them. To a perfect assignement of dower eight things are to be observed: [a] First, regularly the assignement must be certaine, as our author here saith (7).

[a] S. E. 2.
Ent. 75.
40. E. 3. 22.
45. E. 3. 5, 6.
[b] 1. Mar.
Dyer 91.
1 E. 2.
Dower 146.
28. H. 6. 2.
Dyer 9. El. 263.
26. Aff. 41.
31. E. 3. Scir. fa. 99.
Cro. Eliz. 451.

Secondly, (8) it [b] must be either of some part of the land whereof she is dowable, or of a rent or some other profit issuing out of the same, either before judgement or after, which rent may be assigned to her by parol. But an assignement of other land whereof she is not dowable, or of a rent issuing out of the same, is no barre of her dower (9).

31. E. 3. Scir. fa. 99. 33. H. 6. 2. Vernon's case. 4. Co. 1. 5. E. 4. 22. (1. Ro. Abr. 628. 684. Noy 55. Mo. 59. Post. 169.)

Thirdly, the assignement must be absolute, and not conditionall, or subject to any limitation (10).

Fourthly, it must be made by him that is tenant of the land; but herein certaine diversities are to be observed (11).

[c] 7. H. 6. 34.
10. E. 2.
Dower 169.
10. E. 3. 38.
(2. Co. 67.)

If two or more be jointenants of lands, [c] the one of them may assigne dower to the wife of a third part in certainty, and this shall binde his companions, because they were compellable to do the same by law (1). But if one of them assigne a rent out of the land to the wife, this shall not binde his companion, because he was not compellable by the law thereunto (2). If the husband make severall feoffments of severall parcells, and dyeth, and the one feoffee assigne dower to the wife of parcell of land in satisfaction of all the dower which she ought to have in the land of the other feoffees, the other feoffees shall take no benefit of this assignement, because they are strangers thereunto, and cannot plead the same (3). But in that case

[35. a.]

(9. Co. 18.
Mo. 26.)

(4) 20. E. 4. 14. Hal. MSS.
(5) [See Note 215.]
(6) Nota, P. 38. Eliz. *Wentworth's case*.
It ought to be pleaded by the word assignavit
not dedit. Hal. MSS.—See Cro. Eliz. 452.
(7) Vid. ante 32. b. *Lambert's case*. Hal.
MSS.—See n. 1. in 32. b. & *supra* n. 1.
(8) 12. H. 4. 17. Hal. MSS.
(9) [See Note 216.]
(10) [See Note 217.]
(11) *And this ought to be averred in plead-*
ing. Dy. 361. Hal. MSS.—See S. C. in

Cro. Eliz. 451. and Noy 55.

[35. a.]

(1) [See Note 218.]
(2) [See Note 219.]
(3) Vid. *the statute of Westminster 1. cap.*
48. 4. E. 3. 42. M. 8. Jack. C. B. n. 15.
D. D. *adjudged accordingly in Throgmorton's*
case. Hal. MSS.—However, mr. Perkins
seems to think, that such an assignment by
one feoffee may be pleaded in bar of dower
by the other feoffees. Perk. sect. 402.

if the husband dyeth seised of other lands in fee simple, and the same descend to his heire, and the heire endoweth the wife of certaine of those lands in full satisfaction of all the dower that she ought to have aswell in the lands of the feoffees as in his owne lands, this assignement is good, and the severall feoffees shall take advantage of it (4). And therefore if the wife bring a writ of dower against any of them, they may vouch the heire, and he may pleade the assignement which he himselfe hath made in safety of himselfe, lest they should recover in value against him, [d] so as there is a privity in this respect betweene the heire and the feoffees, and by this meanes the same may be pleaded by the heire that made it (5). And so it is adjudged in our bookes, which is a notable case for many purposes.

Fifthly, if assignement be made [e] by any disseisor, abator, intruder, or any wrong doer, of lands or tenements, if they came to that estate by collusion and covin betweene the widow and them, albeit the widow hath just cause of action, and the assignement be indifferently made after judgement by the sherife of an equall third part, yet shall the disseisee, &c. avoyd it, for covin in this case shall suffocate the right that appertained to her, and so the wrongfull manner shall avoyd the matter that is lawfull (6).

Sixtly, An assignement by [f] (7) a disseisor, abator, intruder, &c. if there be no covin, is good, unlesse it be prejudiciall to the disseisee, &c. As if the husband [g] infeoffeth the younger sonne with warranty, the eldest sonne disseise the yongest sonne, and endow the widow, in this case the yonger sonne shall avoyd this assignement (8), for otherwise he shall lose his warrantie: but a disseisor, abator, intruder, &c. cannot assigne a rent out of the land to her for her dower, to bind the disseisee, &c.

Seventhly, No assignement can be made, but by such as have a freehold (9) (as hath beene said), or against whom a writ of dower doth lie, and therefore [b] an assignement by a gardian in socage is voyd (10); but a gardian in chivalry may assigne dower (11), as shall be said hereafter, because a writ of dower lieth against him, and not against a gardian in socage.

Eightly, And before the gardian in chivalry enter (12), the heir within age [i] may assigne dower, for the gardian may waive the wardship. And so briefly have you heard, of what, by whom, and to whom the assignement must be made (13). But there needeth neither livery of seisin, nor writing, to any assignement of dower, because it is due of common right.

[i] 7. R. 2. admefurement 4. F. N. B. 143. f. (Post. 38. b.)

(4) 31. E. 3. *Scire facias* 99. Hal. MSS.

(5) Vid. if the heir by receipt shall have the plea. Keilw. 128. Hal. MSS.

(6) See further on this subject Hugh. on Orig. Wr. 199.

(7) 3. E. 3. 1. 50. E. 3. 7, 8. Hal. MSS.

(8) 3. E. 3. 18. By Herle, the assignement shall bar in such a case. Hal. MSS.

(9) Acc. Perk. 404.

(10) A quære is made of this in 1. Ro. Abr. 682.

(11) And yet guardian in chivalry had only a chattel interest. See post. 38. b. where it is explained why a dower might be brought against him.

(12) But not after entry of the guardian. 9. H. 6. 6. Hal. MSS.

(13) See further as to assignment of dower, post 39. b. Perk. sect. 393. to 423. Hugh. on Orig. Wr. 194. and 198. New Abr. Dower D. and Vin. Abr. Dower S. to A. a.

[d] 33. E. 3. tit. Judgm. 254.

8. E. 3. 69.

17. E. 3. 58. b.

3. E. 3. tit.

Dower 76.

3. E. 3.

Vouch. 196.

See the Second

Part of the In-

stitut. W. 1.

cap. 49.

[e] 25. Aff. p. 1.

44. Aff. 29.

44. E. 3. 46.

27. Aff. 74.

11. H. 4. 60.

15. E. 4. 4.

19. H. 8. 12.

Litt. 83. 151.

(2. Co. 67.)

1. Ro. Abr. 549.

1. Sid. 21.

Post. 357.

3. Co. 78.

6. Co. 58. a.

5. Co. 30. b.)

[f] 12. Aff.

p. 20.

21. E. 3. 12.

[g] 3. E. 3. tit.

Dower 77.

16. E. 2. tit.

dower Statham.

(Post. 357.)

[b] 31. E. 1.

Dower 151.

29. Aff. 68.

15. E. 3.

Dower 69.

(6. Co. 57.)

Sect. 40.

DOWMENT *ex assensu patris* est, lou le pier est seisie de tenements en fee, et son fits et heire apparent, quant il est espouse, endowe sa feme al huys del monasterie ou del esglise, de parcel de terres ou tenements son pier de assent son pier, et assigne la quantitie et les parcells. En ceo case apres le mort le fits, la feme entera en mesme le parcell sauns auter assignement de nuluy. Mes il ad este dit en cest case, que il covient a la feme d'aver un fait de le pier provant son assent et consent de cel endowment. M. 44. E. 3. fol. 45. (1).

DOWMENT by assent of the father is, where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcells. In this case after the death of the son, the wife shall enter into the same parcell without the assignement of any. But it hath been sayd in this case, that it behooveth the wife to have a deed of the father to proove his assent and consent to this endowment. M. 44. E. 3. f. 45.

Brit. ca. 109.
Fleta, lib. 5.
ca. 22, 23.
Bract. lib. 5.
305.
6. E. 3. 34.
F. N. B. 150.
(1. Ro. Abr.
677.)

(1. Sid. 3.
Post. 36. b.)

“**L**OU le pier est seisie de tenements en fee.” Tenant for life of a carve of land, the reversion to the father in fee, the sonne and heire apparent of the father endoweth his wife of this carve, by the assent of the father, the tenant for life dieth, the husband dieth, the reversion was a tenement in the father, and yet this is no good endowment *ex assensu patris*, because the father at the time of the assent had but a reversion expectant upon a freehold, whereof he could not have endowed his owne wife (14); and albeit the tenant for life died, living the husband, yet, *quod initio non valet, tractu temporis non convalescet*. And for the most part, dower *ad officium ecclesie*, and *ex assensu patris*, ensue the nature of a dower at the common law. And for these the wife may have a writ of dower, albeit they be certaine, as for the third part at the common law (2).

[35. b.]

“**E**t son fits et heire apparent.” It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the yongest sonne and heire apparent cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of Borough English, because the father may have another sonne, and then the husband is not heire apparent: and it is in respect of the constant and perpetuall apparance, that the sonne and heire apparent may endow his wife of his father's lands. And so it is of lands in Gavelkind: [k] and this is the reason that dower *ex assensu fratris*, or *consanguinei*, is not good, for that albeit he is heire apparent at that time, yet for the common possibility that he may have issue, and every issue that the brother or cosin should have afterwards shall exclude

[k] 8. H. 3.
Dower 193.
9. H. 3.
Dower 191.
11 H. 3.
Dower. F.N.B.
150. l.
29. E. 3.
Dow. 134.

(14) S. p. acc. Perk. 445.

L. and M. Roh. or P. It was first inserted in Redman's edition. See the observation on this addition to Littleton, post. 36. a.

(2) See acc. ante 34. b. n. 3.

[35. b.]

(1) No reference to the Year Book, in

exclude him, he is no such heire apparent as the law intendeth. [l] But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because there is an apparance of a constant and perpetuall heire. And some have said, that if the father after his assent be attainted of treason or felony, that the wife in that case loseth her dower, because her husband doth not continue heire (3).

[l] F. N. B. 150. e. Flet. 1. 3. cap. 22. Bract. lib. 4. 305. Ambr. Gorge's case. 6. Co. 22.

"*Quant il est espouse, endow sa feme.*" [m] In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetuall apparance of the heire, the heire apparent doth endow, and the father doth but assent. And therefore where the father did endow the wife of his sonne and heire apparent, that endowment was holden void, because the husband in that case must endow, and the father assent.

[m] 2. H. 3. Dower 199. (Post. 38. a.) 6. E. 3. 34. 8. E. 2. Dower 154.

And it is holden in 2. H. 3. Dower 199. (4), That if the heire apparent be within age, yet the endowment *ex assensu patris* is good. Note, *Littleton* in the case of dower *ad ostium ecclesiæ*, doth put the husband of full age, but here of the dower *ex assensu patris*, he speaketh generally.

2. H. 3. Dower 199.

"*Et assigne le quantitie et les parçels.*" So as both in dower *ad ostium ecclesiæ*, et *ex assensu patris*, the certainty must be expressed. And therefore where books speake of a moiety, it is intended (as hath beene said) of an halfe in certaine (5).

[n] 9. H. 3. Dower 190. F. N. B. 150. m. 8. E. 2. Dower 154.

"*Après la mort le fitz sa feme enterà.*" In this case after the death of the husband the wife shall enter, or have a writ of dower albeit the father be alive.

"*Que il covient al feme d'aver un fait provant son assent a cel endowment.*"

"*Un fait,*" A deed, *factum*. This word (deed) in the understanding of the common law is an instrument written in parchment or paper, [o] whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but onely upon parchment or paper, for the writing upon them can be least vitiated, altered or corrupted.

[o] Bract. lib. 2. fo. 33, &c. & 1. 5. fo. 396. Brit. fol. 34. 65, 66. 101. Flet. 1. 3. ca. 14. & lib. 6. ca. 32. & lib. 3. c. 3, 4, 5, 6. (2. Co. 5. Post. 229. a. 2. Ro. Abr. 21.) (5. Co. 74. 76.)

If a deed [p] be alledged in *count* or *plea*, regularly it must be shewed to the court (6), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the Chapter of Conditions. But if *non est factum* be pleaded (7), because thereby the sealing, delivery, or other matter of fact is denied, it shall be tried by the

[p] 4. E. 2. Fines 116. 14. E. 2. Ley 79. 4. E. 2. Ley 78. 27. H. 6. 10. 27. H. 8. 22. F. N. B. 122. 1. (5. Co. 18.)

4

country.

(3) See Plowd. Quær. 181.

(4) *This book is not to the purpose.* Hal. MSS.

(5) *Dower good of a moiety in common in the said book.* Vid. ante. Hal. MSS.—

See acc. 9. H. 3. Dower 190. which is the book meant by lord Hale. See also ante 34. b. n. 1.

(6) [See Note 220.]

(7) [See Note 221.]

[q] Brit. fol.
101.
Braet. 1. 2.
fol. 33.
Fleta, lib. 3.
ca. 14.
(2. Inst. 673.)

country. Of deeds some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the Chapter of Conditions. Also of deeds, some be inrolled, and some [q] be not inrolled. If it be inrolled according to the statute of 27. Hen. 8. cap. 10. it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so was it resolved in parliament by the judges in anno 23. Eliz. Now for the rest of the parts of a deed, you shall read thereof plentifully in our bookes, and in my Reports; which by this short instruction you shall easily understand (1).

[36. a.]

“*Un fait de feoffement.*” It is properly called *charta feoffamenti* (2), and yet if such a deed be denied, the plea is *non est factum*. So as of deeds some concerne the realtie, as here a deed of feoffement; some the personaltie, as a deed of gift of goods, obligations, bills, &c. And some mixt, whereof more shall be said in the Chapter of Releases.

(2. Rol. Abr. 26.
9. Co. 137.
Noy 50. 11.
Cro. Jam. 85.)
35. Ass. Pl. 11.
Tr. 29. H. 8.
Dyer. 95.
(1. Cro. El. 835.
Hob. 246.
Dy. 34. b.
N. Ben. 75.
1. And. 4. Cro.
El. 884.
1. Raym. 197.
Ow. 95.
Dy. 192. b.
Dal. 104.)
[r] Tr. 43.
Eliz. inter
Haukesby &
Lacher in the
King's Bench.
Hill. 12. Ja. R.
in the Common
place.
(5. Co. 119. b.)
[f] 13. H. 8.
19. H. 8. 8.
4. E. 3. 18.
13. H. 4. 8.
(3. Co. 26. b.)
1. Leon. 140.
2 Ro Abr. 24.)
[t] Braet. lib. 2.
fol. 33. b. Fleta, lib. 3. cap. 14.

If a man deliver a writing sealed, to the partie to whom it is made, as an escrow to be his deed upon certaine conditions, &c. this is an absolute deliverie of the deed, being made to the partie himself, for the deliverie is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is onely requisite, and then when the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur*. And hereof though there hath been [r] variety of opinions, yet is the law now settled agreeable to judgments in former times, and so was it resolved by the whole court of common pleas (3). But it may be delivered to a stranger, as an escrowe, &c. because the bare act of deliverie to him without words worketh nothing (4). And this is the ancient diversitie [s] in our bookes, the record whereof I have seene agreeable with the reason of our old booke's (5). And as a deed may be delivered to the partie without words, so may a deed be delivered by words without any act of deliverie (6), as if the writing sealed lyeth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Goe and take up the said writing, it is sufficient for you, or it will serve the turne; or, Take it as my deed, or the like words, it is a sufficient delivery (7).

Of deeds and their distinctions you shall reade excellent matter in antiquitie. [t] *Cartarum, alia regia, alia privatarum, et regiarum, alia privata, alia communis, et alia universitatis. Privatarum, alia de puro feoffamento et simplici, alia de feoffamento condicionali sive conventionali, alia de recognitione pura, vel condicionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni, non è contra, debent inservire.*

Carta

(1) See further as to deeds, Perk. c. 2. ante 6. a. and n. 5. there. Sheph. Touchst. c. 4. Vin. Abr. tit. *Deeds* and also tit. *Faits*. Com. Dig. *Fait*.

(2) For the formal parts of a deed of feoffment, see ante 6. a.

(3) In Mo. 697. there is an opinion of some judges in 39. Eliz. to the contrary; but the authorities since are with lord Coke. See acc. Mo. 642. Noy 6. Hob. 246.

9. Co. 137. Sty. 251. 6. Mod. 218.

(4) See Dy. 167. b.

(5) [See Note 222.]

(6) [See Note 223.]

(7) Trin. 3. Eliz. *Gibson* vers. *Tenant Bendl. n. 140.* Hal. MSS.—See S. C. in N. Bendl. 92. and Dy. 192.—See further as to the delivery of deeds Sheph. Touchst. 57. Com. Dig. *Fait* A. 3. Vin. Abr. *Faits*, I. and K.

Carta non est [u] nisi vestimentum donationis. Carta non est nisi vestimentum orationis. Nemo tenetur armare adversarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis. [w] Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat. Nihil tam [x] conveniens est naturali æquitati, quàm voluntatem domini volentis rem suam in alium transferre ratam habere.

[u] Fleta, lib. 6. ca. 28.

Bracton, lib. 2. fo. 34.

[w] Bracton, lib. 2. fo. 94, 95.

[x] Idem, l. 2. fo. 18.

[y] *Re, verbis, scripto, consensu traditione, Junctura vestes sumere pasta solent.*

[y] Pl. Com. in Throgmorton's case, fol. 161. b.

Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter est intelligendum. Verba debent intelligi secundum subjectam materiam. Carta de non ente non valet.

Note, the father may [a] make a deed to the wife of his sonne, and so is the law holden, for that the father's land by his assent is charged with a future freehold whereunto a deed is requisite; but to a dower *ad ostium ecclesiæ* no deed is requisite. And here it is not well done (of him that made the addition to our author) to vouch 44. E. 3. fo. 45. because the author himselfe vouched it not, for if he [b] meant to have vouched authorities, he would have vouched more than one in this case, and those that [c] he vouched he would have cited truly, but this case is mistaken both in the yeare and in the leafe, for whereas it is cited in 44. E. 3. it is in 40. E. 3. and whereas he saith it is fo. 45. it is fo. 43.

[a] 3. E. 2. Dower 126.

8. E. 2.

Dower 154.

6. E. 3. 34.

40. E. 3. 43.

[b] 11. H. 3. Dower 186.

14. H. 3. Dower.

[c] 2. E. 2.

Dower 125.

Vid. Stat.

Walliæ anno

12 E. 1.

fo. 18; in veteri

magna carta.

47. H. 3.

An assignment of dower [d] either *ad ostium ecclesiæ*, or *ex assensu patris*, may be made of more than a third part. But the ancient law was that no greater assignment could be made in those cases but of a third part, but lesse might, as appeareth in *Glanvill*.

Dower 174.

[d] F. N. B. 150. p.

Glanvil. lib. 6. ca. 1, 2, 3.

Sect. 41.

E*T si apres la mort le baron el enter, et agree a ascun tiel dower de les dits dowers ad ostium ecclesiæ, &c. donque el est conclude de clamer ascun auter dower per le common ley d'ascuns terres ou tenements queux fueront a sa dit baron. Mes si el voit, el poit refuser tiel dower ad ostium ecclesiæ, &c. et donque el poet estre endow solonque le cours del common ley.*

AND if after the death of her husband she entreth, and agree to any such dower of the said dowers at the church doore, &c. then she is concluded to claim any other dower by the common law of any the lands or tenements which were her husband's. But if she will, she may refuse such dower at the church doore, &c. and then she may be endowed after the course of the common law.

“**E***L est conclude a clamer ascun auter dower per la common ley.*”

[36. b.]

(8) Wherein a diversitie is to be observed between a dower *ad ostium ecclesiæ*, or *ex assensu patris*, and a joynture or estate made to the wife in satisfaction of her dower, for one of those dowers being assented unto is a barre of the dower at the common law, but a joynture was no barre of her dower at the common law. For a right or title that one hath to a freehold cannot be barred by acceptance of collaterall satisfaction (1). But a woman cannot

(Doc. Pla. 149.)

Vernon's case,

4. Co. 1.

1. Mariæ, Dyer

91. 31. E. 3.

Scire fac. 99.

20. E. 4. 3.

(8) Vid. 32. E. 1. Dower 126. 177.—Hal. MSS.

(1) [See Note 224.]

(Dy. 248. a.
317. a)
27. H. 8. cap. 10.
[a] 12. E. 2.
Dower 158.
27. H. 8. cap. 10.
versus finem.
(4. Co. 1.
3. Cro. Jam.
489.)

not have a double dower, viz. *ad ostium ecclesie*, &c. and at the common law, for the wife of one husband can have but one dower. But since *Littleton* wrote, by the statute of 27. H. 8. if a joynture be made to [a] the wife, according to the purview of that statute, it is a barre of her dower, so as the woman shall not have both joynture and dower, and to the making of a perfect joynture within that statute fixe things are to be observed. First, her joynture by the first limitation is to take effect for her life in possession or profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate. Thirdly, it must be made to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage.

(1. Sid. 3.)

Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of *A.* for life, and then to the use of the wife for life in satisfaction of her dower, this is no joynture within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case *A.* should die living the husband, and after the death of the husband the wife entrench, yet this is no barre of her dower, but she shall have her dower also (2), because it is not within the said statute, and (as it hath been said) by the common law it was no barre of her dower (3). 2. It must be either in fee taile, or for terme of her owne life, for an estate for life or lives of one or many other, or to her for a hundred or a thousand yeares, &c. if she lives so long, or without such limitation, is no barre of her dower, albeit they be expressly made in satisfaction of her dower, *causa qua supra* (4). 3. If an estate be made to others in fee simple, or for her life upon trust, so as the estate remaine in them, albeit it be for her benefit, and by her assent, and by expresse words to be in full satisfaction of her dower, yet is this no barre of her dower (5). The fourth is so plaine as it needeth not any example. 5. A devise by will cannot be averred to be in satisfaction of her dower, unlesse it be so expressed in the will (6). 6. If the joynture be made before marriage, the wife cannot waive it and claime her dower at the common law; but if it be made after marriage, she may waive the same, and claime her dower (7). I have touched these points the more summarily, because they are resolved at large with the reasons thereof in *Vernon's case ubi supra*. So as to comprehend all in few words, a joynture (which in common understanding extendeth as well to a sole estate as to a joynt estate with her husband) is a competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently in possession or profit after the decease of her husband for the life of the wife at the least, if the herselfe be not the cause of determination of forfeiture of it. Which see more at large in *Vernon's case ubi supra*. If a joynture be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her joynture, she shall not be endowed of any of the other lands of her husband. But if the joynture had

Leake & Randall's case,
4. Co. 4.
(3. Co. 25. 27.)

Vide Vernon's case, ubi supra, fo. 2. b.

Dyer 19. Eliz.
358.

[37. a.]

- §
(2) T. 26. Jac. *Sherwell's case* Hutt. Hal. MSS.
51. accord.—Hal. MSS. (5) [See Note 226.]
(3) [See Note 225.] (6) [See Note 227.]
(4) Vid. M. 29. and 30. Eliz. C. B. Rot. (7) [See Note 228.]
334. Devise to the wife for 7 years.—

been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of his lands. But in the other case, the joynture of the wife made before marriage was not waivable at all. Now as the dower *ad ostium ecclesiæ* and *ex assensu patris*, is better for the wife, because in respect of the certainty she may enter, than the dower at the common law, where she is driven to her reall action, and therefore Britton calleth dower *ad ostium ecclesiæ*, and *ex assensu patris* establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertaine is established); so a joynture (that hath the force of a barre of dower by the said act of 27. H. 8.) is, as hath been said, more sure and safe for the wife than either dower *ad ostium ecclesiæ*, or *ex assensu patris*, for besides it is as certaine as those others, and she may enter into it, after the death of her husband, and not be driven to her action. She shall not be barred of her joynture albeit her husband commit treason or felonie, as she shall be both of her dower *ad ostium ecclesiæ* and *ex assensu patris* by the common law. But now at this day by the statutes of 1. E. 6. cap. 12. and 5. E. 6. cap. 11. a wife shall not lose any title of dower which to her was accrued, by the attainder of her husband by any manner of murder or other felony whatsoever. But [a] if the husband be attainted of high treason or petit treason she shall be [b] barred of her dower at this day, so long as that attainder standeth in force.

Brit. cap. 102.
103.

Bract. 311. lib. 4
Britton, ca. 15.

1. E. 6. ca. 12.
5. E. 6. ca. 11.
(Post. 40. b.)
[a] Stanford,
195. b.
[b] Vid. in the
Chapter of Gar-
ranty, Sect.

“Conclude” commeth of the [c] verbe *concludo*, which is derived of *con* and *claudo* to determine, to finish, to shut up, to estoppe or barre a man to plead or claime any other thing. *Vid. Estoppel.*

[c] Pl. Com.
276. b. per
Wals. Vide
Sect. 693. 695.
667. 679.

Sect. 42.

ET nota, que nul feme serra endow ex assensu patris en le forme avantdit, mes lou sa baron est fitt et heire apparent a son pier. Quære de ceux deux cases de dowment ad ostium ecclesiæ, &c. si la feme, al temps del mort sa baron, ne passe l'age de ix. ans, si el avera dower ou non.

AND note, that no wife shall be endowed *ex assensu patris* in forme aforesaid, but where her husband is sonne and heir apparant to his father. Quære of these two cases of dowment *ad ostium ecclesiæ*, &c. if the wife, at the time of the death of her husband, be not past the age of 9. yeares, whether she shall have dower or no.

“NUL feme serra endow, &c.” Of this sufficient hath beene said before.

(Ante 33. 2.)

“Quære de ceux deux cases de dowment ad ostium ecclesiæ, &c.” And it seemeth, that these dowers being made by assent, &c. that the same are good albeit the wife be within the age of nine yeares, for *Consensus tollit errorem*. But without question, a joynture made to her under or above the age of nine yeares, is good.

Sect. 43.

ET nota, que en tous cases leu le certainty appiert queux terres ou tenements feme avera pur sa dower, la le feme poit entrer apres la mort sa baron sans assignement de nulluy. Mes lou le certainty ne appiert, si come d'estre endow de la tierce part d'aver en severaltie, ou del moitie solonque le custome de tener en severaltie, en tielz cases il covient que sa dower soit a luy assigne apres le mort del baron; pur ceo que non constat devant assignement, quel part des terres ou tenements, el avera pur sa dower.

AND note, that in all cases, where the certainty appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without assignement of any. But where the certainty appeares not, as to be endowed of the third part, to have in severalty, or the moiety according to the custome to hold in severalty, in such cases it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appeare before assignement, what part of the lands or tenements she shall have for her dower.

40. E. 3. 22. 43.

45. E. 3. 4.

20. E. 3.

barre 137.

8. E. 2.

Entry 75.

(Ant. 34. b.)

“**E**T nota, que en tous cases, &c.” In all cases, where the demand of the dower is certaine, as in case of dower *ad officium ecclesie* or *ex assensu patris*, there the wife after the death of the husband may enter (1). But where the demand is uncertaine, as in writs of dower at the common law, there albeit the thing it selfe be certaine, yet shall she not take it without assignement. As if a woman bring a writ of dower of three shillings rent, albeit she ought to be endowed of one shilling, yet cannot she after judgment distrein for twelve pence before assignment (2), because the demand was uncertaine. And so it is if two tenants in common be, and the wife of one of them bring a writ of dower to be endowed of a third part of a moitie, and have judgement to recover, yet cannot she enter without assignement, albeit the assignement cannot give her any certainty, because her husband's state was incertaine. See more of this before Section 39.

[37. b.]

Sect. 44.

MES si soient deux jointenants de certaine terre en fee, et l'un alien ceo que a luy assiert, a un auter en fee, que prent feme, et puis devie; en ceo cas la feme pur sa dower avera le tierce part de la moitie que sa baron ad purchase, a tener en common (come sa part amountera) ovesque l'heire sa baron, et ovesque l'auter jointenant, que ne aliena pas, pur ceo que en tiel cas sa dower ne poit estre assigne per metes et bounds.

BUT if there be two joyn tenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this case the wife for her dower shall have the third part of the moitie which her husband purchased, to hold in common (as her part amounteth) with the heire of her husband, and with the other jointenant, which did not alien, for that in this case her dower cannot be assigned by metes and bounds.

Of

(1) It seems, that though it be assigned, the freehold is not in her till entry. 9. E. 3. 5.—

Hal. MSS.

(2) [See Note 229.]

Of this sufficient hath beene said before, and that in this case the wife cannot enter without assignement.

Sect. 45.

ET est ascavoir, que la feme ne serra my endow de terres ou tenements, que sa baron tient jointment ovesque un auter al temps de son marant; mes lou il tient en common, auterment est, come en le case prochain avantdit.

AND it is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth joyntly with another at the time of his death; but where he holdeth in common, otherwise it is, as in the case next abovesaid.

THE reason of this diversity is, for that the jointenant, which surviveth, claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower, and may plead the feoffment made to himselfe without naming of his companion that died, as shall be said hereafter in his proper place; but tenants in common have severall freeholds and inheritances, and their moities shall descend to their severall heires, and therefore their wives shall be indowed. (1. Ro. Abr. 676.)

[38. a.]

Sect. 46.

ET est ascavoir, que si tenant en le taile endowa sa feme ad ostium ecclesiæ, come est avantdit, ceo servera pur petit ou rien al feme, pur ceo que apres la mort sa baron, l'issue en le taile puit entrer sur le possession la feme; et issint puit celuy en le reversion, si ne soit issue en le taile en vie, &c.

AND it is to be understood, that if tenant in taile endoweth his wife at the church doore, as is abovesaid, this shall little or nothing at all availe the wife, for that after the decease of her husband, the issue in taile may enter upon her possession; and so may he in the reversion, if there be no issue in taile then alive.

THE reason of this is, for that tenant in taile is restrained by the sayd statute of 13. E. 1. *de donis conditionalibus*.

And so did our author take the law in his learned reading. Here our author's reason is *à fine*, and therefore such an endowment is not to be made because it is to no end. Vide Sect. 194.

Sect. 47.

AUXR, si home seisie en fee simple, esteant deins age, endowa sa feme al huiiz del monasterie ou d'eglise, et devie, et sa feme enter, en ceo cas l'heire le baron luy puit ouster. Mes auterment est (come il semble) lou le pier est seisie en fee, et le firs deins age endow

ALSO, if a man seised in fee simple, being within age, endoweth his wife at the monasterie or church doore, and dieth, and his wife enter, in this case the heire of the husband may out her. But otherwise it is (as it seemeth) where the father

is

*endow sa feme ex assensu patris, le pier
donque esteant de plein age.*

is seised in fee, and the sonne within
age endoweth his wife *ex assensu patris*,
the father being then of full age.

Vid. 9. H. 3.
tit. dower 197.

(Ante 34. a.)

THE reason of this diversitie is, for that in the first case the husband within age is seised, and therefore he being within age cannot by a voluntary act bind himself: otherwise it is, where he doth an act whereunto he is compellable by law, but in the latter case the father which giveth the assent is seised of the freehold and inheritance, and the sonne therein hath nothing, and therefore his heire shall not avoide it in respect of his infancy.

Sect. 48.

AUXY, il y ad un auter endowment, que est appel dowment de la plus beale. Et ceo est come en tiel case que home seisie de xl. acres de terre, et il tient vint acres de les dits xl. acres de terre, d'un per service de chivalrie, et les autres vint acres de terre d'un auter en socage, et prent feme, et ont issue firs, et morust, son firs esteant deins l'age de xiiii. ans, et le seignieur de que la terre est tenu en chivalrie entre en les xx. acres tenus de luy, et eux ad come gardein en chivalrie durant le nonage l'enfant, et la mere de l'enfant enter en le remnant, et ceo occupie come gardein en socage: si en tiel case le feme port brieve de dower envers le gardein en chivalrie, d'estre endow de les tenements tenus per service de chivalrie, en le court le roy, ou en auter court, le gardein en chivalrie puit pleder en tiel case tout cest matter, et monstre coment la feme est gardein en socage, come devant est dit; et prie que serra adjudge per la court, que le feme luy mesme endowera de la plus beale de les tenements que il ad come gardein en socage, selonque le value de le tierce part que el clame d'aver de les tenements tenus en chivalrie per sa brieve de dower. Et si la feme ceo ne puit dedire, donques le judgement serra fait, que le gardein en chivalrie tiendra les terres tenus de luy durant le nonage l'enfant quit de le feme, &c. (1)

ALSO, there is another dower, which is called dowment *de la plus beale*. And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of the said forty acres, of one by knights service, and the other twenty acres of another in socage, and taketh wife, and hath issue sonne, and dieth, his sonne being within the age of fourteene yeeres, and the lord of whom the land is holden by knights service entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie during the nonage of the infant, and the mother of the infant entreth into the residue, and occupieth it as gardein in socage: if in this case the wife bringeth a writ of dower against the gardein in chivalry, to be endowed of the tenements holden by knights service, in the king's court, or other court, the gardein in chivalry may pleade in such case all this matter, and shew how the wife is gardein in socage, as aforesaid; and pray that it may be adjudged by the court, that the wife may endow her selfe *de la plus beale*, i. e. of the most faire of the tenements which she hath as gardein in socage, after the value of the third part which she claimes by her writ of dower, to have the tenements holden by knights service. And if the wife cannot gainsay this, then the judgement

(1) Et que la feme poet endowen lui meme de la plus beale partie de la terres, que ele

ad come gardein en socage a le value, &c. L. and M.

ment shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c.

[38. b.] *E* *le seignior de que le terre est tenu en chivalrie enter en les* "vint acres tenus de luy." For he is not possessed as a gardein against whom a writ of dower lieth, untill he doth enter. Of the wardship of the body he is possessed before seisure, because it is transitory, but he is not possessed of the land untill he enter, because it is permanent. And therefore if he doth not enter, the heire within age may assigne dower, as hath been said, and as it appeareth afterwards.

(Ante 35.)
Vid. le statut.
de bigamis,
cap. 3.

"*Si en tiel case el port breve de dower envers le gardein en chivalrie.*" Albeit [a] the gardein in chivalrie or the grantee of the king of a wardship hath but a chattle during the minority of the heire, and the woman shall recover a freehold in her writ of dower, yet after the gardein as is aforesaid hath entered into the land, that writ lieth against him, and not against the heire who is tenant of the freehold, because the law hath trusted the gardein to plead for the heire within age, and that is in his custody, and also for his own particular interest, and by this diversity all the bookes be reconciled (1).

[a] 44. E. 3. 13.
4. H. 6. 11.
Stanf. prær. 13.
6. E. 3. 15.
16. E. 3.
breve 657.
Temps E. 1.
breve 863.
11. E. 3.
breve 473.
45. E. 3. 5.
9. H. 6. 6. b.
(9. Co. 17.)

17. E. 3. 70. 1. H. 7. 17. 4. H. 7. 1. 4. H. 7. aid le Roy 33. 38. E. 3. 13.
39. E. 3. 8. 8. E. 2. Dower 169. 8. E. 2. breve 809. 22. E. 4. Dower 16.

So likewise if the gardein die, the wife shall have a writ of dower against his executors; and if there be two executors, and one of them alone take the profits, the writ of dower shall be maintained against him only. If a man be possessed of the wardship of certaine land, either joyntly with his wife or in the right of his wife, yet the writ of dower lieth against the husband onely. Gardein in focage shall not endow herselfe *de la plus beale* without judgement, as shall be said hereafter.

8. E. 3. 52.
8. E. 3. 15.
& 31.
38. E. 3. 37.
47. E. 3. 9. b.

[39. a.] "*Le gardein en chivalrie poit pleader.*" The authority of *Littleton* is direct that the gardein may plead this plea. But hereof ariseth two questions. First, whether if the heire be vouched by the tenant in the writ of dower in the gard of the gardein (2), whether he coming in as vouchee may plead that plea. The second is whether if the gardein in focage have not sufficient, as if the land holden by service of chivalry be thirty acres, and the lands holden in focage but five acres, whether she shall be endowed by parcels, viz. to recover five acres against the gardein in chivalry, and to retaine five acres. And as to the first, the gardein shall as well plead it, when he comes in as vouchee, as when he is tenant. And as to the second, some say that the demandant in the writ of dower must have assets in her hands to the value of her dower, so as she shall not be partly endowed against the gardein, and partly retaine in her owne hands. And they say, that the judgement should be in part, that is, as to the land in focage in severalty, and as to the land in chivalry to recover the third part, and compare it to the case in 8. E. 4. 3. that damages shall not be recovered, partly against the defendant in an appeale, and partly against the abettors, but entirely either against the one or the other. And *Littleton* here putteth

5. E. 3. 60.
2. E. 3. 31. Lib.
Intrat. Dower,
fol. 225. a.
18. E. 3. 4. b.

14. H. 7. 26.
Keeble.
(12. Co. 125,
126.)

(1) [See Note 230.]

(2) [See Note 231.]

putteth this case that the gardein in socage hath affets in value, and seeing it is a dower against common right, they hold that she must be entirely endowed either by herselfe against common right, or against the gardein according to common right. But [a] yet by the booke in 25. E. 3. 52. b. and others it appeareth, that she may in this very case retaine for part, and recover against the gardein for part (2).

Gardein in chivalry [b] shall plead in barre of her dower, detainment, or eloigning of the body of the ward, because his marriage doth appertaine unto him: and if the heire come in [c] as vouchsee, he shall plead the same plea. But he shall not plead detainment of the charters, [d] because the charters concerning the inheritance of the heire belong not to the gardein (3). The gardein in chivalry [e] may assigne dower of the lands and tenements he hath in ward, or if he assigne a rent out of those lands in allowance of her dower, it is good. If the gardein in chivalrie assigne too much for her dower, the heire shall have a writ of admesurement by the common law (4). And so [f] if the heire within age assigne, before the gardein enter, to the wife too much in the dower, the gardein shall have a writ of admesurement by the statute of *West.* 2. cap. 7. And if the heire within age, before the gardein enter into the land, assigne too much in dower, he himselfe shall have a writ of admesurement at full age: and some have said, that in that case he may have it within age. [g] But if the heire (before the gardein enter) endow the wife of more than she ought, and the gardein assigne over his estate, his assignee shall have no writ of admesurement, because it was a thing in action. Also, the heire shall have an [h] admesurement for the assignment in the life of his ancestor, by the common law, [i] and a writ of admesurement lyeth upon an assignment in chancery.

[a] 25. E. 3. 52. b.
4. E. 2. tit. disseisin.
10. Regist.
Judic. 26 Lib.
Intrat. 22.
16. E. 3. breve 657.
20. E. 3. judgment. 175.
[b] 7. E. 3. 57.
8. E. 3. 71.
(Doc. Pla. 149.)
[c] 17. E. 3. 58.
[d] 10. E. 3. 50.
6. El. Dy. 230.
[e] 3. E. 3. Dow. 75.
8. E. 2. Dow. 155.
W. 2. cap. 7. (F. N. B. 148, 149.
2. Inst. 367.)
[f] Bract. li. 4. 314.
Reg. origin. 171.
Flet. li. 5. ca. 22.
7. E. 2. tit. Admes. 13.
F. N. B. 149.
[g] 7. R. 2. Admes. 4. F. N. B. 148. i.
ub. sup. 12. H. 6. Admes. 9. F. N. B. 149. 25. E. 3. 51.

“Donques le judgement serra fait que le gardein en chivalrie tien-
dra les terres tenus de luy durant le nonage l'enfant quit de la feme,
“&c.”

“Judgement.” *Judicium, quasi juris dictum*, the very voyce of law and right, and therefore, *Judicium semper pro veritate accipitur*. The ancient words of judgement are very significant, *Consideratum est, &c.* because that judgement is ever given by the court upon due consideration had of the record before them: and in every judgement there ought to be three persons, *actor*, *reus*, and *judex*. Of judgements some be finall, and some not finall, whereof you shall read more hereafter. And now to returne to our author, it is material that these words (*et cætera*) be explained at large, viz. *Et quoddam prædicta A.* (the demandant) *capiat de terris hæred' prædicti in custodia sua existens ad valentiam præd' 3 partis cum pertinent' tenend' nomine dotis sue pro præd' 3. parte superius per eam petit* (5). Now some

(1. R. Abr. 201.
Cro. Ch. 442.
Post. 168. a.)

22. E. 4. Dow.
16. 16. E. 3.
Wast. 100.
45. E. 3. 6.

(2) Vid. 2. E. 3. Vouch. 213. 13. E. 3. Judgment 165.—Hal. MSS.

(3) Vid. 9. Rep. 15. b. *Ann Bedingfield's case*.—Hal. MSS. See further as to pleading detainment of charters, Hugh. Orig. Wr. 183. Vin. Abr. Dower L. M. and N.

(4) See further as to admesurement of dower, Vin. Abr. Dower Q. a. and as to assignment in chancery, Hugh. O. ig. Wr. 171. New Abr. Dower D. 3.

(5) 15. E. 3. Dower 69.—Hal. MSS.

some are of opinion, that upon this judgement the demandant may not in any sort endow herselfe of the land, because she cannot do an act to herselfe, but she shall recoupe the third part of the profits upon her account, and be endowed against the heire at his full age (6). But observe what *Littleton* saith in the next Section: but before you

[39. b.]

come to that, observe what privilege the common law giveth to the land holden by knights service, viz. that it shall not be dismembered, but the whole dower taken of the lands holden in socage; and the reason is, for that knights service is for the defence of the realm, which is *pro bono publico*, and therefore to be favoured.

Sect. 49.

ET nota, que apres tiel judgement done, la feme puit prendre ses vicines, et en leur presence endower luy mesme per metes et bounds de la plus beale part de les tenements que el ad come gardein en socage (1), d'aver et tener a luy pur terme de sa vie; et tiel dower est appel dower de la plus beale.

AND note, that after such a judgement given, the wife may take her neighbours, and in their presence endow herselfe by metes and bounds of the fairest part of the tenements which she hath as gardein in socage, to have and to hold to her for terme of her life; and this dower is called *dower de la plus beale*.

And the judgement, viz. *tenend' nomine dotis*, proveth, that she may have it for terme of her life, for every dower is for terme of life.

Sect. 50.

ET nota, que tiel dowment ne puit estre, mes lou le judgement est fait en le court le roy, ou en auter court, &c. (2) et ceo est pur salvation del estate del gardeine en chivalrie durant le nonage l'enfant.

AND note, that such dowment cannot be, but where a judgement is given in the king's court, or in some other court, &c. and this is for the preservation of the estate of the gardein in chivalrie during the nonage of the infant.

“*LOU le judgement est fait, &c.*” For without such a judgement, as appeareth before, gardeine in socage cannot endow herselfe, as likewise hath bin said before (3).

15. E. 3.
Dower 69.
16. E. 3. tit.
Wast. 100.

“*Ou en auter court.*” That is, by writ of right of dower in the court of the heire, if he have any, or of the lord of whom the land is holden.

Braet. lib. 329.
F. N. B. 7. 8.

“*Et ceo est pur salvation del estate del gardein en chivalrie durant le nonage de l'enfant.*” For the heire (before the entre of the gardein)

(6) [See Note 232.]

&c. ad ceo. L. and M. — Roh. — P. and Red.

[39. b.]

(1) *A le valurwe de le tierce partie des tenementz que le gardeyn en chevalerye ad,*

(2) *Que le feme ceo puist faire,* L. and M. — Roh.

(3) [See Note 233.]

dein) cannot plead the same plea, that the demandant should endow herselfe *de la plus beale*. And the reason of this dower *de la plus beale* to be all of the socage land, was for advancement of chivalrie for the defence of the realme (4).

Sect. 51.

ET issint poyes veier cinque manners de dower, scilicet, dower per le common ley, dower per le custome (5), dower ad ostium ecclesiæ, dower ex assensu patris, et dower de la plus beale.

AND so you may see five kinds of dower, viz. dower by the common law, dower by the custome, dower ad ostium ecclesiæ, dower ex assensu patris, and dower de la plus beale.

This is manifest of itselfe, and therefore needeth no explanation.

Sect. 52.

[40. a.]

ET memorandum, que en chescun case lou home prent feme seisie de tiel estate de tenements, &c. issint que l'issuc, que il ad per son feme, poit per possibilitie enheriter mesmes les tenements de tiel estate que la feme ad, come heire al feme; en tiel case, apres le mort la feme, il avera mesmes les tenements per le curtesie de Angleterre, et auterment nemy.

AND memorandum, that in every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not.

Sect. 234. 301.
335.

Ante 29. b.

[a] 21. E. 3. 9.

31. H. 7.

3. H. 7. 17.

Stamf. 195.

27. E. 3. 77.

46. E. 3.

Petit 20.

26. Aff. p. 2.

13. H. 4. 8.

“**MEMORANDUM.**” This word doth ever betoken some excellent point of learning, which our author hath used in other places, as appeareth in the margent.

The matter hereof hath bin partly explained in the Chapter of Tenant by the Curtesie. If a man [a] taketh a wife seised of lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesie, in respect of the issue which he had before the felonie, and which by possibilitie might then have inherited. But if the wife had been attainted of felony before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesie (1).

[b] 3. Co. 34.
in Paine's case

“Come heire al feme.” This doth implie [b] a secret of law, for except the wife be actually seised, the heire shall not (as hath been

(4) Vid. 16. E. 3. 88. She may recoup the third part of the profits on her own account, ut videtur, without judgment. Hal. MSS.

(5) Besides the books cited ante 33. b. as to dower by custom, see Hugh. Orig. Wr. 160. Robins. Gavelk. cap. 2. New

Abr. Dower K. Vin. Abr. Copyhold H. c. Com. Dig. Copyhold K. 2.

[40. a.]

(1) See ante 29. b. n. 4. and Vin. Abr. Curtesy, H.

been said) make himselfe heire to the wife (2): and this is the reason that a man shall not be tenant by the curtesie of a feisin in law.

Sect. 53.

ET auxy, en chescun case lou la feme prent baron seisie de tiel estate des tenements, &c. issint que si per possibilitie il puisse happer que si le feme avoit ascun issue per le baron, et que mesme l'issue puisse per possibilitie enheriter mesmes les tenements de tiel estate que le baron ad, come heire a le baron, de tiels tenements el avera sa dower, et auterment nemy. Car si tenements sont dones a un home, et a les heires que il engendra de corps sa feme, en tiel case la feme n'ad riens en les tenements, et le baron ad estate forsque come donee en especiall taile. Uncore si le baron devy sans issue, mesme la feme serra endow de mesmes les tenements; pur ceo que l'issue, que el per possibilitie puisse aver per mesme le baron, puisse enheriter mesmes les tenements. Mes si la feme deviaist, vivant sa baron, et puis le baron prist auter feme, et morust, sa second feme ne serra my endow en cest case, causâ quâ suprà.

wife, and dieth, his 2. wife shall not be endowed in this case, for the reason aforesaid.

"ISSINT que si per possibilitie il puit happer que si le feme avoit
"ascun issue per son baron."

Albeit the wife be a hundred
years old, or that the husband at his death was but foure or seven
years old (3), so as she had no possibilitie to have issue by him, yet
seeing the law saith, that if the wife be above the age of nine years
at the death of her husband, she shall be endowed, and that women
in ancient times have had children at that age, whereunto no wo-
man doth now attaine, the law cannot judge that impossible, which
by nature was possible. And in my time, a woman above three-
score years old hath had a child, and *idèd non definitur in jure*.
And for the husband's being of such tender yeares, he hath *habitu-*
tum, though he hath not *potentiam* at that time, and therefore his
wife shall be endowed,

"E:

(2) See 8. Co. 36. a. where 11. H. 4. 11. and 40. E. 3. 9. are cited to prove this doctrine. See also ante 11. b. where it is advanced as a general rule, that he who claims by descent, must make himself heir

to the person last *actually* seised. See further ante 14. b. 15. b. and n. 3. in 11. b. W. Jo. 361. and Blackst. Law Tr. 8vo. ed. vol. 1. p. 180.

(3) See ante 33. a.

"*Et que mesme l'issue puiſſoit per poſſibilitie inheriter mesmes les tene-
ments, &c.*" A man ſeiſed of land in generall taile, taketh wife,
and after is attainted of felony, before the ſaid ſtatute of 1. E. 6.
the iſſue ſhould have inherited, and yet the wife ſhould not have
bin endowed: for the ſtatute of W. 2. ca. 1. relieveth the iſſue in
taile, but not the wife in that caſe (1). But at this day, if the
huſband be attainted of felony, the wife ſhall be endowed, and yet
the iſſue ſhall not inherit the lands which the father had in fee ſim-
ple. If the wife elope from her huſband, &c. ſhe ſhall be barred
of her dower, as hath beene ſaid (2), and yet the iſſue ſhall in-
herit (3).

(Ante 37. a.)

(F. N. B. h.
150.
Ante 32. a.)

Sect. 54.

5. E. 3.
Voucher 249.
8. E. 3.
Aff. 293.
4. H. 6. 24.
F. N. B. 149.

You may eaſily perceive by the context that this ſhaft came never
out of *Littleton's* quiver of choice arrowes (4), and therefore I
will leave it. Onely for ſtudents ſake I will referre them to 5. E. 3.
Voucher 249. 8. E. 3. Aff. 293. 4. H. 6. 24. F. N. B. 149.

NOTA, ſi un home ſoit ſeiſie de
certaine terres, et priſt un feme,
et puis aliena mesme la terre ove
garrantie, et puis le feoffor et le feoffee
deviont, et la feme de le feoffor port un
action de dower envers le iſſue le
feoffee, et il vouch l'heire le feoffor, et
pendant le voucher et nient termine, la
feme le feoffee port ſon action de dower
envers le heire le feoffee, et demaunda
la tierce part de ceo de que ſa baron fuit
ſeiſie, et ne voile demaunder le tierce
part del eux deux parts de que ſa baron
fuit ſeiſie; fuit adjudge, que el n'avera
judgement tanque l'auter plee fuit de-
termine.

NOTE, if a man be ſeiſed of
certaine lands, and taketh wife,
and after alieneth the ſame land with
warrantie, and after the feoffor and
feoffee dye, and the wife of the feoffor
bring an action of dower againſt the
iſſue of the feoffee, and he vouch the
heire of the feoffor, and hanging the
voucher aſſid undetermined, the wife of
the feoffee brings her action of dower
againſt the heire of the feoffee, and
demand the third part of that whereof
her huſband was ſeiſed, and will not
demand the third part of theſe two
parts of which her huſband was ſeiſed;
it was adjudged, that ſhe ſhould have
no judgement untill ſuch time as the
other plea were determined.

[41. a.]

Sect. 55. (1)

ET nota, que *Vaviſour* dit, que ſi un
home ſoit ſeiſie de terre et fait
felonie, et puis alien, et puis eſt at-
taint,

AND note, *Vaviſor* ſaith, that if a
man be ſeiſed of land and com-
mitteth felony, and after alieneth,
and

(1) 12. H. 4. 3. by *Hankford*. — Hal.
MSS. See further as to loſs of dower by
the huſband's offences ante 37. a. poſt. 392.
b. *Hugh. Orig. Wr.* 156. and *Vin. Abr.*
Dower, Q. 6.

(2) See ante 32. a.

(3) See another inſtance, where the iſſue
ſhall inherit and yet the wife ſhall not be
endowed, in *Park. ſett.* 317.

(4) Section 54. is neither in the edition
by L. and M. nor in the *Roh.* edition. It
appears to have been firſt added in the edi-
tion by P.

[41. a.]

(1) Sect. 55. is not in L. and M. nor in
Roh. but is in P. and the ſubſequent edi-
tions.

taint, la feme avera bone action de dower envers le feoffee: mes si soit escheate al roy, ou al seignior, el n'avera breve de dower. Et sic vide diversitatem, et quære inde legem.

and after is attained, the wife shall have a good action of dower against the feoffee: but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and enquire what the law is herein.

THIS is also of the new addition, *et explosa est hæc opinio*; for it is cleare in law, that the wife at the common law should not have been endowed against the feoffee. For to deterre and restraine men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony. 1. He shall lose his life, and that by an infamous death of hanging betweene heaven and the earth, as unworthy in respect of his offence of either. 2. His wife, that is a part of himselfe, (*et erunt animæ duæ in carne unâ*) shall lose her dower. 3. His blood is corrupted, and his children cannot be heires to him, and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4. He shall forfeit all his lands and tenements; and 5. all his goods and chattels; and all this is included by the law in the judgement, *quod suspendatur per collum*. But this is not intended of all felonies, but of felony by stealing of goods above the value of xii. pence, and not of *petit larceny* under the value (2). So as the woman shall lose her dower as well against the feoffee as against the lord by escheat. And so it was resolved in a writ of dower brought by *Mary Gates* late wife of *John Gates*, who after the coverture had infeoffed *Wiseman* in fee, and after committed high treason, and was thereof attainted, that the wife should not be indowed against the feoffee, and in that case it was resolved, that so it was at the common law in case of felony (3). And it is to be understood, that the wife shall not only lose her reasonable dower at the common law for the felony of her husband, but also her dower *ad osium ecclesiæ*, and *ex assensu patris* (4), for felony done after the dower assigned, and dower by custome also (5). And the reason of all this is yielded by *Littleton* himselfe in the Chapter of Warranties, Section 746. to the end that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been said) shall be endowed by force of the statutes in that case provided.

And it appeareth by *Britton*, *que fem de homicide ne teigne nul dower de tenants que lour fuit assigne per lour barons*, so as the wife of a felon attainted by the common law was disabled to recover dower *ad osium ecclesiæ*, and *ex assensu patris*, as well as her reasonable dower which the common law gave her. See in *Brañon* many barres of dower as the law was then held.

Vide Sect. 746.
Vide Britton,
cap. 109. l. 1.
Brañon title
Evidens, l. 4.
fo. 397. 30. 311.
Stanf pl. cor.
194, 195.
Britton, fol. 15.
cap. 5.

Vide Sect. 746.
(1. Leon. 3.)

M 3. & 4. Ph.
& Mar. Ro. 76c.
in com. banco.
8. E. 3. 20.
12. H. 4. 30.

Brañon, lib. 4.
fol. 311.

Vide Sect. 746.
Britton, cap. de
Homicide,
fo. 15.
Brañon, lib. 4.
fol. 308. &
Fleta ubi supra,
& Britton ubi
supra.

(2) But outlawry in trespasss doth not bar.
3. E. 3. 7. 41. Hal. MSS.
(3) [See Note 234.]

(4) [See Note 235.]
(5) [See Note 236.]

CHAP. 6. *Tenant a terme de vie.*

Sect. 56. [41. b.]

TENANT *pur terme de vie est, lou home lessa terres ou tenements a un auter pur terme de vie le lessée, ou pur terme de vie d'un auter home. En tiel case le lessée est tenant a terme de vie. Mes per common parlance celuy que tient pur terme de sa vie demesne, est appel tenant pur terme de sa vie; et cestuy que tient pur terme d'auter vie, est appel tenant pur terme d'auter vie.*

TENANT for term of life is, where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life; and he which holdeth for terme of another's life, is called tenant for terme of another man's life.

(Cro. Ja. 200. 554.) **O**U *per terme de vie d'un auter home.* Now it is to be understood, that if the lessee in that case dieth living *cestuy que vie* (that is, he for whose life the lease was made), he that first entreth shall hold the land during that other man's life, and he that so entreth is within Littleton's words, viz. *tenant pur auter vie*, and shall be [a] punished for waste as *tenant per auter vie*, and subject to the payment of the rent reserved, and is in law called an *occupant* (1) (*occupans*), because his title is by his first occupation. And so if tenant for his owne life grant over his estate to another, if the grantee dyeth there shall be an *occupant*. In like manner it is of an estate created by law [b]; for if tenant by the curtesie or tenant in dower grant over his or her estate, and the grantee dieth, there shall be an *occupant* (2). But against the king there shall be no *occupant*, because *nullum tempus occurrit regi*. And therefore no man shall gain the king's land by priority of entry. There can be no *occupant* of any thing that lyeth in grant (3), and that cannot passe without deed, because every *occupant* must claime by a *que estate*, and averre the life of *cestuy que vie* (4). It were [c] good to prevent the incertainty of the estate of the *occupant* to adde these words (to have and to hold to him and his heires during the life of *cestuy que vie*), and this shall prevent the *occupant*, and yet the lessee may assigne it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to assigne his estate to divers men and their heires during the life of *cestuy que vie* (5).

[a] Vide le Deane de Worcest. case, 6. Co. 37. 27. Aff. 31. 39. E. 3. 1. 27. H. 6. Recognizance. Statham pl. ultimo. 38. H. 6. 27. Bracton, lib. 2. fo. 9. Britton, fo. 84, 85. (Vaugh. 189, 190. Cro. El. 407.) [b] 27. Aff. p. 31. & Pl. Com. fo. 28. b. in Colthorff's case, tit. Barre 303. (Cro. Jam. 201. Mo. 394. Cro. El. 2. 57. Mo. 664. Cro. Jam. 282.) [c] Littleton 167. 11. H. 4. 42. 17. E. 3. 48. 39. E. 3. 25. 7. H. 4. 46. 8. H. 4. 15. Dier. 8. Eliz. 253. (2. Ro. Abr. 150, 151. 1. Ro. Abr. 844. 1. Leon. 126. Post. 239. a.)

[d] Bract. lib. 4. fo. 222, 231, 232. & vid. fo. 136, 137. Fleta, lib. 4. ca. 19. 25, 26, 27. 8. E. 3. 54, 55. 21. E. 3. 41. 48. E. 3. 31. 7. E. 4. 28. 21. H. 6. 46. 10. E. 4. 3. F. N. B. 180. 4. Co. 86, 87. in Luttrell's case.

(1) [See Note 237.]

(4) [See Note 240.]

(2) [See Note 238.]

(5) [See Note 241.]

(3) [See Note 239.]

that is *estoverium claudendi*, and these estovers must be reasonable, *estoveria rationabilia*. And these the lessee may take upon the land demised without any assignement, unlesse he be restrayned by speciall covenant (6), for *modus et conventio vincunt legem*. Note in the Saxon tongue, and *estovers* in the French, in this case are all of one signification, that is, to have compensation or satisfaction for these purposes: *Estovers* commeth of the French word *estover*. And the same estovers that tenant for life may have, tenant for years shall have. (11. Co. 46.)

You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another man's life: to this may be added a third, viz. into an estate both for terme of his owne life, and for terme of another man's life. Vide Sect. 381.

(1) As if a lease be made to *A.* to have to him for terme of his owne life, and the lives of *B.* and *C.* for the lessee in this case hath but one freehold, which hath this limitation, during his owne life, and during the lives of two others. And herein is a diversity to be observed betweene severall estates in severall degrees, and one estate with severall limitations. For in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not. As if *A.* be tenant for life, the remainder or reversion to *B.* for life, *A.* may surrender to *B.* for the estate of *B.* for terme of his own life is higher than an estate for another man's life: and therefore if tenant for life infeoffe him in the remainder for life, this is a surrender, and no forfeiture. (2) And albeit an estate for terme of a man's own life be but one freehold, yet may severall freeholds in certaine cases be derived out of the same, whereof our bookes are very plentiful, and whereof you may disport your selves for a time. (Ante 31. b. post. 273. b.)

(42. a.) (2) As if tenant for life maketh a lease by deed, or without deed, to him in the remainder, or reversion, in taile or in fee, for the term of the life of him in the remainder or reversion, and after he in the remainder taketh wife and dieth, his wife shall not be endowed, for tenant for life shall enjoy the land again; for forfeiture it cannot be, for he in the remainder was party; and surrender it cannot be, for that his whole estate was not given (1) (5. Co. 13. (9. Co. 9. b.)

(3) The heire maketh a lease for life, reserving a rent, against whom the wife recovereth her dower and dieth, the lessee shall have the land againe for life, and the rent is revived. (Ante 31. b. post. 273. b.)

(4) So it is, if tenant for life take husband and by deed indented they make a lease to him in the reversion for the life of the husband, reserving a rent, this is neither forfeiture, nor absolute surrender, for the cause aforesaid, and the reservation is good. (24. E. 3. 32. & 68.

(5) *B.* seised of lands in fee, taketh to wife *I.* and infeoffes *C.* in fee, who takes *Alice* to wife: *C.* dieth, *Alice* is endowed; *B.* dieth, *I.* recovereth dower against *Alice* and dieth, *Alice* shall enjoy the land againe during her life (2). (30. Aff. p. 47. 19. E. 3. Sur. 8. (1. Co. 76. b.)

(6) *A.* and [*a*] *B.* joyntenants, *A.* for life, and *B.* in fee, joyne in a lease for life (3), *A.* hath a reversion, and shall joyne in an action of waste (4). (13. R. 2. Dow. 95. 7. H. 6. 3. per Cur. 18. E. 3. 48. (2. Ro. Abr. 497. Post. 335. a.)

(7) *B.* seised of lands in fee, taketh to wife *I.* and infeoffes *C.* in fee, who takes *Alice* to wife: *C.* dieth, *Alice* is endowed; *B.* dieth, *I.* recovereth dower against *Alice* and dieth, *Alice* shall enjoy the land againe during her life (2). (8. E. 2. Aff. 393. 45. E. 3. 13. [a] 2. H. 5. 7. 13. H. 7. 15. 18. E. 2. br. 835. F. N. B. 59. f.

Tenant

(6) But affirmative covenants do not restrain. 28. H. 8. Dy. 19. Hal. MSS.

[42. a.]

(1) [See Note 242.]

(2) Hic fol. 21. Hal. MSS.

(3) 13. E. 4. 4. Dy. 237. So of a gift in tail. 38. E. 3. 7. Hal. MSS.

(4) And the writ ought to be ad exhibendum *B.* 13. E. 2. Brief 835. Hal. MSS.

[b] 27. H. 8. 13. Tenant for [b] life and he in the reversion joyne in a lease for life, it is said, that they shall joyne in an action of waste, and that the lessee for life shall recover the place wasted, and he in reversion, dammages (5).

[c] 37. H. 6. 27. If a man grant [c] an estate to a woman dum sola fuit, or durante viduitate, or quamdiu se bene gesserit, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay x l. &c. or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as Bracton faith, is tempus indeterminatum: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed. and in count or pleading he shall alledge the lease, and conclude, that by force thereof he was seised generally for terme of his life (6).

(6. Co. 35. b.) If a man make a lease of a manor, that at the time of the lease made is worth xx l. per annum, to another until c l. be paid, in this case because the annuall profits of the manor are incertain, he hath an estate for life, if livery be made determinable upon the levying of the c l. (7). But if a man grant a rest of xx l. per annum untill c l. be paid, there he hath an estate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in some cases a man shall have an incertaine interest in lands or tenements, and yet neither an estate for life, for yeares, or at will (8). As if a man by

his will in writing, devise his lands to his executors for payment of debts, and untill his debts be paid; in this case the executors have but a chattell, and an incertaine interest in the land untill his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattell, it shall go to the executors of executors for the payment of his debts: and so note a diversity betweene a devise and a conveyance at the common law in his life time. And tenant by statute merchant, by statute staple, and by *elegit*, have incertaine interests in lands or tenements, and yet they have but chattells, and no freehold, whose estates are created by divers acts of parliament, whereof more shall be said hereafter. And so have gardians in chivalry which hold over for single or double value incertaine interests, and yet but chattells.

Vid. Sect. 381. If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and expresse or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life (9). The same law is of a declaration of a use (10). A man may have an estate for terme of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for terme of his life, this is determinable upon the determination of the office.

Vide Sect. 381. A. tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for terme of life, without mentioning for whole life it shall

(5) 3. H. 7. 9. P. 43. Eliz. C. B. D. D. n. 4. But if the lease be without deed it is a surrender. 10. H. 7. 3. 1. Rep. Bredon's case. Hal. MSS.

(6) [See Note 243.]

(7) [See Note 244.]

(8) Plowd. Comment. 273. Hal. MSS.

(9) [See Note 245.]

(10) 21. H. 8. 5. by Shelly. Hal. MSS.

shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said an estate for a man's own life is higher than for the life of another (11). But if tenant in taile make such a lease without expresseing for whose life, this shall be taken but for the life of the lessor, for two reasons.

First, when the construction of any act is left to the law, the law which abhorreth injury and wrong will never so construe it, as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong is wrought. And it is a generall rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken. (Post. 183.)

[42. b.]

(1) Secondly, The law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder discontinue tenant for life, now he hath a fee simple: but if tenant for life die, now is his wrongfull estate in fee by judgment in law changed to a rightfull estate for life.

If a man retaine a servant generally without expresseing any time, the law shall construe it to be for one yeare, for that retainer is according to law. Vid. 23. E. 3. cap. 1, &c. (1) To shut up this point it hath been adjudged, that where tenant in taile made a lease to another for terme of life generally, and after released to the lessee and his heires, albeit betweene the tenant in taile and him a fee simple passed, yet after the death of the lessee the entry of the issue in taile was lawfull; which could not be, if it had been a lease for the life of the lessee, for then by the release it had beene a discontinuance executed (2). But let us now returne to Littleton.

4. E. 2. Wast. 11.
17. E. 3. 7.
(Mo. 258. 363.
Post. 276. a.)

29. H. 6.
7. H. 4. 32.
6 E. 3. 17.
7. E. 3. 66.
18. E. 3. 60.
23. E. 3. c. 1,
&c.
11. H. 4. 44.
38. E. 3. 23, 24.

Sect. 57.

ET est ascavoir, que il y ad le feoffor et le feoffee, donor et le donee, le lessor et le lessee. Le feoffor est properment lou home enfeoffa un auter en ascuns terres ou tenements en fee simple, celuy que fist le feoffment est appel feoffour, et celuy a que le feoffment est fait est appel feoffee. Et le donour est properment lou un home done certaine terres ou tenements a un auter en le taile, celuy que fist le done est appel le donor, et celuy a que le done est fait est appel le donee. Et le lessor est properment lou un home lessa a un auter certaine terres ou tenements pur terme de vie, ou pur terme des ans, ou a tener

AND it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffes another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands

(11) [See Note 246.]

(2) [See Note 248.]

(1) [See Note 247.]

a tener a volunt, celuy que fist le leas est appel lessor, et celuy a que le leas est fait est appel lessee. Et chescun que ad estate en ascun terres ou tenements pur terme de sa vie ou pur terme d'auter vie, est appell tenant de franktenement, et nul auter de meindre estate poit aver franktenement: mes ceux de greinder estate ont franktenement; car cestuy en fee simple ad franktenement, et celuy en le taile ad franktenement, &c.

or tenements for terme of life, or for terme of years, or to hold at will, he which maketh the lease is called lessor, and hee to whom the lease is made is called lessee. And every one which hath an estate in any lands or tenements for term of his owne or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c.

THIS and the rest that follow in this Chapter concerning the description of the feoffor and feoffee, donor and donee, and lessor and lessee, are evident.

“ Et est asavoir que il y ad le feoffor et le feoffee, &c.” Vide Sect. 2. where a light touch is given who may purchase. Now somewhat is to be said, who have ability to enfeoffe, &c. and may be a feoffor, donor, lessor, &c. Whosoever is disabled by the common law to take, is disabled to infeoffe, &c. But many that have capacitie to take, have no abilitie to infeoffe, &c. as men attainted of treason, felony, or of a *præmunire*, aliens borne, the king's villaines, traitors, felons, &c. he that hath offended against the statutes of *præmunire*, after the offences committed (3) if attainders ensue, ideots, madmen, a man deafe dumbe and blinde from his nativity, a feme covert, an infant, (4) a man by dures; for the feoffments, &c. of these may be avoyded. But an hereticke, though he be convicted of heresie, a leper removed by the king's writ from the society of men, bastards, a man deafe dumbe or blinde, so that he hath understanding and sound memory, albeit he expresse his intention by signes, villaine of a common person before entrie, or the like may infeoffe, &c.

[43. a.]

[a] All feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Universities, or elsewhere, deans and chapters, master or gardian of any hospital, parson, vicar, or any other having spirituall or ecclesiastical living, are also to be avoyded; [b] and all the said bodies politique or corporate are by the statutes of the realm disabled to make any conveyances to the king, or to any other, as it hath been adjudged: which statutes have bin made since Littleton wrote (1).

It is provided [c] by the statute of *Magna Charta*, *quod nullus liber homo det de cætero amplius alicui de terrâ suâ quàm ut de residuo terræ suæ possit sufficient' fieri domino feodi servitium ei debitum quod pertinet ad*

Bracton, lib. 5. fo. 415.
Britton, fo. 88.
Fleta, lib. 3. ca. 3. & lib. 6. ca. 39, 40.

2. H. 5. ca. 7. which is repealed. Doct. and Stud. lib. 2. ca. 29.

[a] 32. H. 8. cap. 28.
1. El. not printed.
13. El. ca. 10.
14. El. ca. 11.
18. El. ca. 20.
1. Ja. cap. 3.
[b] 4. Co. 76.
120. 5. Co. 6. 14.
6. Co. 37.
11. Co. 67.
Magdalen Colledge case.
Vide Lest. de W. 2. ca. 41.
[c] Magna Charta, cap. 32. Mirror, cap. 5. sect. 2. Glanvil. lib. 7. ca. 1. Bract. lib. 1. Brit. 88, &c. Fleta, lib. 3. cap. 3.

(3) As to conveyances made by felons or by offenders against the statutes of *præmunire* between indictment and attainder, see W. Jo. 217. Cro. Cha. 172. and Will. vol. 1. part 2. page 219.

(4) [See Note 249.]

[43. a.]

(1) [See Note 250.]

ad feodum illud. Upon which act I have heard great question [d] made, whether the feoffments made against that statute were voydable or no; and some have said that the statute intended not to avoyd the feoffment, but implicate to direct the tenure, viz. that the tenant should not infeoffe another of parcell to hold of the chief lord (that is of the next lord) but to hold of himselfe, and then the lord may distreine in everie part for his whole service without any prejudice unto him. But this opinion is against [e] the authoritie of our bookes, and against the said statute of *Magna Charta*. For first it is agreed in 10. H. 7. that as well before the statute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithstanding the lord might have distrained in which of the acres he would for his whole services: and reason teacheth that before that statute a tenant could not have aliened parcell to hold of the chiefe lord; for the feignory of the lord was entire, for the which the lord might distraine in the whole or in any part, and which the tenant by his owne act cannot divide to the prejudice of the lord to barre him to distraine in any part, for his services, as he should doe, if he should enseoffe another of parcell to hold of the chiefe lord. But the tenant might have made a feoffment of the whole to hold of the chiefe lord, for there no prejudice ensued to the lord (2). Others have said, and they said truly, that the intention of the statute was, that the tenant could not alien parcell (which might turn to the prejudice of the lord) without his assent, and this appeareth cleerly by the *Mirror*. And by this statute the king tooke benefit to have a fine for his licence, before which statute no fine for alienation was due to the king. For it is [f] adjudged that for an alienation in time of *Henry* the second, no fine was due; and it appeareth in our bookes, that if an alienation had beene made before 20. H. 3. no fine was due to the king for alienation (3). Now it is to be observed, that oftentimes for the better understanding of our bookes, the advised reader must take light from historie and chronicles, especially for distinction of times. And therefore *Matthew Paris* (who in his *Chronicle* reciteth *Magna Charta*) (4) testifieth that king *Henry* the third by evill counsell (and especially, as the truth was, of *Hubert de Burgo* then chiefe justice) sought to avoyde the Great Charter first granted by his father king *John*, and afterward granted and confirmed by himselfe in the ninth of *Henry* the third, for that as he the said king *John* did grant it by duress, and that he himselfe was within age when he granted and confirmed it. But forasmuch as afterwards the said king *Henry* the third in the twentieth yeare of his raigne, at what time he was nine and twentieth yeare old, did grant and confirme the said Great Charter; for that cause, to put out all scruples, is the twentieth yeare of *Henry* the third named, albeit in law the king's charter granted in the ninth yeare of *Henry* the third was of force and validitie, notwithstanding his nonage, for that in judgement of law the king, as king, cannot be said to be a minor; for when the royall bodie politique of the king doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie (1).

For,

[d] Vide an excellent declaration hereof in the adjudication of the Reges, Trin. E. 1. fol. 2. in Thesaur. Nov. & Derb.

[e] Bract. lib. 1. 10. H. 7. fol. 10. b. 33. E. 3. Avowry 253. Stamf. præ. fo. 29. 8. E. 4. 12.

Mirror, cap. 5. sect. 2. Fleta, lib. 3. cap. 3. [f] 26. Ass. p. 37. 20. Ass. p. 17. 20. E. 3. Avowry 126. 34. E. 3. c. 15. Vide Stamf. 29, 30. Matt. Paris. Walsingham 37. 39.

Vide 5. H. 3. Mordant. Magna Charta there voucheth which was the charter of King John, for it was cited before 9. H. 3.

[43. b.]

- (2) [See Note 251.]
(3) [See Note 252.]
(4) [See Note 253.]

(1) See this subject considered at large in the case of the Dutchy of Lancaster Plowd. 214, and in *Willion and Berkley*, Plowd. 234.

20. Aff. pl. 17.
by Skipwith.

For, *omne majus trahit ad se quod est minus*. And it is to be observed, that no record can be found, that either a licence of alienation was sued, or pardon for alienation was obtained for an alienation without licence at any time before the twentieth yeare of *Henry* the third, and it is holden in the twentieth of *Edward* the third, that a licence for alienation grew by this statute.

Britt. fo. 28. 88.
186, 187. 245.
247. Præf.
Regis, ca. 7.
Fleta, lib. 6.
cap. 29. acc.
20. E. 3.
Aff. 122.
29. Aff. pl. 19.
14. E. 3. quare
imp. 45.
14. H. 4. 2, 3.
9. E. 3. fo. 26.
1. E. 3. ca. 12.
34. E. 3. ca. 15.
2. Co. 81, 82.
in Seignior
Cromwell's case.
Regist. Int. les
brevés de one-
rand' pro rata
portionne.

Now in the case of a common person it was the common opinion, that if the tenant had aliened any parcell contrary to the said act, that he himsele was bound by his owne act, but that his heire might have avoyded it; and in the king's case many held the same opinion. For *Britton* saith, *ne counts, ne barons, ne chiualer, ne serjeants, que teignent en chiefe de nous ne purr' my dismember nous fees sauns licence: que nous ne puissent per droit engettre les purchasors, &c.* And herewith agreeth *Fleta*, and our bookes. But now by the statute 1. E. 3. cap. 12. & 34. E. 3. cap. 15. although the king's tenant in chiefe or by grand serjantie doe alien all or any part without licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1. E. 3. that complaint was made that land holden of the king *in capite*, being aliened without licence, was seized as forfeited. And in the case of a common person, the statute of 18. E. 1. *De quia emptores terrarum* hath made it cleare, for this hath in effect as to the common persons taken away the said statute of *Magna Charta* cap. 32. for thereby it is provided, *quod liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita quod feoffatus teneat, &c. de capitali domino*. And herein are divers notable points to be observed. First, that this word *liceat* proveth that the tenant could not, or at least wayes was in danger to alien parcell of his tenancy, &c. upon the said act of *Magna Charta*. Secondly, that upon the feoffment of the whole, the tenant shall hold of the chiefe lord. Thirdly, that the tenant might infeoffe one of part to hold *pro particula* of the chiefe lord. But this act (the king being not named) doth not take away the king's fine due to him by the statute of *Magna Charta* (2).

(Plowd. 561. b.
562.)
Bracton, lib. 4.
fo. 224.
Britton, cap. 32.
& 47.
Bracton, lib. 4.
fo. 22.
Regist. Ju. 6.
68. 73.
28. Aff. p. 7.
W. 2. ca. 18.
Stat. de mer-
catoribus an.
13. E. 1.
27. E. 3. ca. 9.
23. H. 8. ca. 6.
F. N. B. 178.
(Ante 42. a.)

“ *Franktenement.*” Here it appeareth that tenant in fee, tenant in taile, and tenant for life, are said to have a franktenement, a freehold, so called, because it doth distinguish it from termes of yeares, chattels-upon incertaine interests, lands in villenage or customary, or copyhold lands. *Liberum autem tenementum dicitur ad differentiam villenagii, et villanorum qui tenent villenagium, quia non habent actionem nec assisam, &c. item quod sit suum et non alienum, hoc est, si teneat nomine alieno ut firmarius et ad terminum vel sicut creditor ad vadium.* And note that tenant by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* untill their debt be paid, and yet in troth they (as hath beene said) have no freehold, but a chattle, which shall go to the executors, and the executors also if they be ousted shall have an assise. But (*ut*) is similitudinary, because they shall by the statutes have an assise as tenant of the freehold shall have, and to that respect hath a similitude of a freehold, but *nullum simile est idem*.

CHAP. 7. Tenant for terme of yeares. Sect. 58.

TENANT pur terme d'ans est, lou home lessa terres ou tenements a un auter pur terme de certaine ans, solonque le number des ans que est accord perenter le lessor et le lessee. Et quant le lessee entrer per force del leas, donque il est tenant pur terme des ans; et si le lessor en tiel case reserve a luy un annuall rent sur tiel leas, il poit eslier a distraîner pur le rent en les tenements lesses, ou il poit aver un action de debt pur les arrerages enverz le lessee. Mes en tiel case il covient, que le lessor soit seise de mesmes les tenements al temps del leas; car il est bone plee pur le lessee a dire que le lessor n'avoit riens en les tenements al temps de le leas, sinon que le leas soit fait per fait endent, en quel case tiel plee donque ne gist en le bouch le lessee a pleader.

TENANT for terme of yeares is where a man letteth lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee. And when the lessee entreth by force of the lease, then is he tenant for tearme of yeares; and if the lessor in such case reserve to him a yearly rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behooveth, that the lessor be seised in the same tenements at the time of his lease; for it is a good plee for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plee lieth not for the lessee to plead.

“**L**OU home lessa terres, &c.” Lessa and lease is [a] derived of the Saxon word *leapum*, or *leafsum*, for that the lessee commeth in by lawfull meanes; [b] and *dimittere* is in French *laxser*, to depart with or forgoe.

[a] Mirror, cap. 2. sect. 17. Bracton, lib. 2. cap. 26. & lib. 4. fol. 220.

[44. a.]

When *Littleton* wrote, many persons might make leases for yeares, or for life, or lives at their will and pleasure, which now cannot make them firme in law. And some persons may now make leases for yeares, or for life or lives (observing due incidents), firme and good in law, who of themselves could not do when *Littleton* wrote, and this by force of divers acts of parliament [c]; as namely 32. H. 8. 1. Eliz. 13. Eliz. 18. Eliz. and 1. Jac. Regis, of which statutes one is enabling, and the rest are disabling. When *Littleton* wrote, bishoppes with the confirmation of the deane and chapter, master and fellowes of any colledge, deaness and chapters, master or gardian of any hospitall, and his brethren, parson or vicar with the consent of the patrone and ordinary, archdeacon, prebend, or any other body politique spirituall and ecclesiasticall (*concurrentibus hiis quæ in jure requiruntur*) might have made leases for lives or yeares without limitation or stint. And so might they have made gifts in taile or states in fee at their will and pleasure, whereupon not onely great decay of divine service, but dilapidations and other inconveniences ensued, and therefore they were disabled and restrained by the sayd acts of 1. Eliz. 13. Eliz. and 3. Jac. Regis to make any state or conveyance to the king at all, or to the subject; but there is excepted out of the restraint or disability, leases for three lives, or one and twenty yeares, with such re-

Fleta, lib. 3. cap. 12. & lib. 5. cap. 34.

[b] For the word (*dimitto*) see Sect. 531.

[c] 32. H. 8. cap. 28.

1. Eliz. not printed but in the abridgement 13. Eliz. cap. 10. 18. Eliz. cap. 6

1. Jac. cap. 3. 5. Co. 14. case de ecclesiastica persons. 11. Co. 66 Magdalen Colledge case. Levesque de Sarum's case 10. Co. 60 (1. Sid. 1

(Cro. Cha. 16.
47. 50.
10. Co. 58.
1. Alexf. 134.
2. Mod. 16.
Finch 191, 192,
193.
Cro. Cha. 48.
Cro. Jac. 173.)

servation of rent, and with such other provisions and limitations, as hereafter shall appeare. Also, they may make grants of ancient offices of necessity with ancient fees, *concurrentibus hiis quæ in jure requiruntur*, for those grants are not within the statute of 32. H. 8. but by construction, they are not restrained by the statutes of 1. Eliz. or 13. Eliz. because these ancient offices be of necessity, and with the ancient fees, and so no diminution of revenue (1).

There be three kinds of persons that at this day may make leases for three lives, &c. in such sort as is hereafter expressed, which could not so doe when *Littleton* wrote, viz. First, any person seised of an estate taile in his owne right. Secondly, any person seised of an estate in fee simple in the right of his church. Thirdly, any husband and wife seised of any estate of inheritance in fee simple or fee taile in the right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in taile, by deed to binde his issues in taile, but not the reversion or remainder, the bishop, &c. by deed without the deane and chapter to bind his successors, the husband and wife by deed to bind the wife and her and their heires (2), and these are made good by the statute of 32. H. 8. which inableth them thereunto. But to the making good of such leases by the said statute, there are nine things necessarily to be observed belonging to them all, and some other to some of them in particular.

4. Co. 6. Seig.
Mounjoye's
case.
13 Lev. 438.
Cro. Ja. 94.
438.)
4. Co. 2.
Elmer's case.

First, the lease must be made by deed indented, and not by deed poll, or by paroll (3).

Secondly, it must be made to begin from the day of the making thereof, or from the making thereof (4).

[44. b.]

Thirdly, if there be an old lease in being, it must be surrendered (1) or expired, or ended within a yeare of the making of the lease, and the surrender must be absolute and not conditionall.

Fourthly, there must not be a double lease in being at one time; as if a lease for yeares be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives according to the statute, nor *à converso*; for the words of the statute be, to make a lease for three lives, or one and twenty yeares, so as one or the other may be made, and not both (2).

(Cro. Cha. 95.
Cro. Ja. 112.
173.)

Fifthly, it must not exceed three lives, or one and twenty yeares, from the making of it, but it may be for a lesser terme or fewer lives.

1. 5. Co. 3.
Lewell's case.
17. E. 3. 75.
9. Aff. 24.
14. E. 3. Scire
facias 22.
10. H. 6. 2.
11. H. 6. 21.
11. Sid. 316,
17. 416. Cro.
1708.)

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeall, which are necessary to be letten, and whereout a rent by law may be reserved, and not [d] of things that lye in grant, as advowsons, faires, markets, franchises, and the like, whereout a rent cannot be reserved (3).

Seventhly, it must be of lands or tenements which have most commonly beene letten to farme, or occupied by the farmers thereof by the space of 20 yeares next before the lease made, so as if it be letten

(1) [See Note 255.]

(2) [See Note 256.]

(3) See New Abr. *Leases*, E. 2.

(4) [See Note 257.]

(2) M. 29. 30. Eliz. *Clench* 138. *Grindal's case*. Hal. MSS.—See S. C. 4. Léon. 78. 1. and 65. and Mo. 107. and the observations upon it in New Abr. *Leases*, E. rule 3.

(3) [See Note 259.]

[44. b.]

(1) [See Note 258.]

letten for 11 yeares at one or severall times within those 20 yeares it is sufficient. A grant [e] by copy of court roll in fee for life or yeares is a sufficient letting to farme within this statute, for he is but tenant at will according to the custome, and so it is of a lease at will by the common law; but those lettings to farme must be made by some seised of an estate of inheritance, and not by a gardian in chivalry, tenant by the curtesie, tenant in dower, or the like (4).

Eightly, that upon every such lease there be reserved yearly during the same lease due and payable to the lessors, their heires and successors, &c. so much yearly farme or rent, or more, as hath bene most accustomedly yielded or paid for the lands, &c. within twenty yeares next before such lease made (5). Hereby first it appeareth (as hath bene said) that nothing can be demised by authority of this act, but that whereout a rent may be lawfully reserved. Secondly, that where not onely a yearly rent was formerly reserved, but things not annuall, as heriots, or any fine or other profit at or upon the death of the farmor, yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the expresse words of the act. Thirdly, if he reserve more than the accustomed rent, it is good also by the expresse letter of the act; but if twenty acres of land have bene accustomedly letten, and a lease is made of those twenty, and of one acre which was not accustomedly letten, reserving the accustomed yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomed rent is not reserved, seeing part was not accustomedly letten, and the rent issueth out of the whole. Fourthly, if tenant in taile let part of the land accustomedly letten, and reserve a rent *pro rata*, or more, this is good, for that is in substance the accustomed rent. Fifthly, if two coparceners be tenants in taile of twenty acres every one of equall value, and accustomedly letten, and they make partition, so as each have ten acres, they may make leases of their severall parts each of them, reserving the halfe of the accustomed rent. Sixthly, if the accustomed rent had bene payable at four daies or feasts of the yeare, yet if it be reserved yearly payable at one feast, it is sufficient, for the words of the statute be, reserved yearly.

Ninthly, nor to any lease to be made without impeachment of waste. Therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is punishable of waste. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be punished for waste (6). The words of the statute be (seised in the right of his church), yet a bishop that is seised *jure episcopatus*, a deane of his sole possessions in *jure decanatus*, an archdeacon in *jure archidiaconatus*, a prebendary and the like are within the statute, for every of them generally is seised in *jure ecclesie* (7).

But a parson and vicar are excepted out of the statute of 32. H. 8. and therefore, if either of them make a lease for three lives, &c. of lands accustomedly letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of 32. H. 8. (8), and not restrained by the statutes of *primo* or

13. Eliz.

[e] 6. Co. 37.
Deane and
Chapter of Wor-
cester's case.

5. Co. 6.
Seignior Mount-
joye's case.

(Cro. Jam. 76.)

6. Co. 37, 38.
Deane and Chap-
ter of Wor-
cester's case.

5. Co. 5.
Seignior Mount-
joye's case.
6. Co. 37.

Lord Mount-
joye's case ubi
supra.

(Cro. Cha. 16,
17.)

Deane and Chap-
ter of Worcest-
ter's case ubi
supra.

Deane and Chap-
ter of Worcest-
ter's case ubi
supra.

3. E. 6. 1. Mar.
tit. Leases.
Bro. 62.
(Finch. 191.)

(4) [See Note 260.]

(5) 6. Rep. 37. F. 3. Jac. Crook. n. 6.
Hal. MSS. See Cro. Jam. 76.

(6) [See Note 261.]

(7) [See Note 262.]

(8) [See Note 263.]

13. *Eliz.* And what hath beene said concerning a lease for three lives, doth hold for a lease for one and twenty yeares.

Thus much shall suffice to have spoken of the inabling statute of 32. *H. 8.* the better to inable the reader to understand both this and that which follows. Now to speake somewhat of the disabling statutes of 1. *Eliz.* and 13. *Eliz.* (9), the words of the exception out of the restraint and disability of 1. *Eliz.* are, *other than for the terme of twenty-one yeares, or three lives, from such time as any such grant or assurance shall be given, whereupon the old and accustomed yearly rent, or more, shall be reserved:* and to that effect is the exception in the statute of 13. *Eliz.* First, it is to be understood that neither of

[45. a.]

(Cro. *Eliz.* 874.)

(1. *And.* 65.)

(1. *Leon.* 59.)

these disabling acts, nor any other, do in any sort alter or change the inabling statute of 32. *H. 8.* but leaveth it for a pattern in many things for leases to be made by others. Secondly, it is to be knowne, that no lease made according to the exception of 1. *Eliz.* or 13. *Eliz.* and not warranted by the statute of 32. *H. 8.* if it be made by a bishop, or any sole corporation, but it must be confirmed by the deanes and chapters, or others that have interest, as hath been said in the case of the parson and vicar, but examples doe illustrate. If a bishop make a lease for 21 yeares, and all those yeares being spent saving three or more, yet may the bishop make a new lease to another for twenty one yeares, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath beene said; and this concurrent lease hath been resolved to be good (1), as well upon the exception of 1. *Eliz.* in the case of bishops, as upon 13. *Eliz.* (2) which extend to spirituall and ecclesiasticall corporations, aggregate of many, as deanes and chapters, &c. which 32. *H. 8.* did not: but in the case of the concurrent lease, in the case of the bishop it must be confirmed. Also the exception of 1. *Eliz.* and 13. *Eliz.* doth differ from the statute of 32. *H. 8.* for the leases for yeares to be made according to the exceptions of the statutes of 1. and 13. *Eliz.* must begin from the making, and not from the day of the making, but by force of 32. *H. 8.* from the day of the making. And although the statutes of the first or thirteenth of *Eliz.* doe not appoint the lease to be made by writing, yet must it therein and in the other eight properties or qualities before mentioned and required by 32. *H. 8.* follow the patterne thereof (the concurrent lease only except). (3) Although the exception in 1. and 13. *Eliz.* concerning the accustomed rent is more generall then that of 32. *H. 8.* and there is not any provision for leases made punishable of waste, &c. yet must the patterne of 32. *H. 8.* be followed: for leases without impeachment of waste made by such spirituall and ecclesiasticall persons are unreasonable and causes of dilapidations. Thus much have I thought good to lead the studious reader by the hand, and to conduct him in the right way, and to put all these things together upon consideration had of all the statutes, which otherwise might have *prima facie* seemed to him a diffuse and darke

(9) [See Note 264.]

[45. 2.]

(1) Accordingly adjudged, though the concurrent lease was to commence a *datu indenture*. 1. 21. *Eliz.* Rot. 124. *Fox and Collier*. M. 22. 23. *Eliz.* C. B. Rot. 2409. *Scot and Brewster*. H. 22. Jac. B. R. Rot.

11. *Evans and Ascu* adjudged. T. 3. Car. P. 33. *Eliz.* W. 14. *Southcot's case*. Hal. MSS.

(2) [See Note 265.]

(3) H. 44. *Eliz.* C. B. n. 14. D. D. *Bishop of Hereford* against *Scory*. Adjudged accordingly, where the land had not been usually demised. Hal. MSS.

darke labyrinth. And albeit it be provided by the said acts of 1. and 13. Eliz. that all grants, &c. leases, &c. made, &c. (other then leases for three lives, or one and twenty yeares, according to those acts) should be utterly voyd and of none effect, to all intents, constructions, and purposes, yet grants, or leases, &c. not warranted by those acts are not voyd, but good against the lessor, if it be a sole corporation: or so long as the deane or other head of the corporation remaine, if it be a corporation aggregate of many (4): for the statute was made in benefit of the successor (5). But let us now returne to our author.

3. Co. 59, 60.
Lincolne Col-
ledge case, p. 39.
Eliz. inter Hunt
and Singleton
ibidem.

"*Home lesse.*" Here *Littleton* putteth this case where one letteth, &c. It is therefore necessary to be seen what the law is where divers joyne in a lease. If the tenant of the land and a stranger which hath nothing in the land joyne in a lease for yeares by deed indented of one and the self-same land, this is the lease of the tenant onely, and the confirmation of the stranger, and yet the lease as to the stranger workes by conclusion (6).

(2. Ro. Abr.
64.)
Vide Sect. 246.
11. H. 4. 1.
5. E. 4. 4. a.
27. H. 8. 16.

(2) If two severall tenants of severall lands joyne in a lease for yeares by deed indented, these be severall leases, and severall confirmations of each of them, from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests passe from them (7). (3) B. tenant for life of C. and he in the remainder or reversion in fee, having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, this demise shall worke in this sort: during the life of C. it is the lease of B. and confirmation of him in the reversion or remainder, and after the decease of C. it is the lease of him in the reversion or remainder, and the confirmation of B.; for seeing the lessors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. (4) Tenant for life and he in the remainder in fee made a lease for yeares by deed indented, the lessee was ejected, and brought an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this speciall matter was found, and that tenant for life was living, and it was adjudged [a] against the pl^r, for during the life of the tenant (as hath been said) it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder (8). [b] And the deed indented could be no estoppel in this case, because there passed an interest from them both. And whensoever any interest passeth from the party, there can be no estoppel against him, and [c] so it was adjudged. Hereby you shall understand your bookes the better which treat of those mat-

(1. Ro. Abr.
877. Mo. 72.
1. Leon. 177.
Cro. El. 701.
6. Co. 15.
Treport's case.
Doc. Pl. 93.)

[a] 27. H. 8.
f. 13. a.
13. H. 7. 14.
2. H. 5. 7.
1. Co. 76.
Bredon's case.
(Post. 302. b.)
[b] Mich. 36.
& 37. Eliz. in
the King's
Bench. Vide
Mich. 6. &
7. Eliz.

Dyer 234, 235.

[c] Hill. 44. Eliz. Rot. 1459. in Communi Banco inter Ellice & Cowne.

(4) [See Note 266.]

(5) See further as to leases by tenants in tail, husband and wife, and ecclesiastical persons, in Vin. Abr. tit. *Estates* and tit. *Confirmation*, and New Abr. tit. *Leases*; which title in the latter book is generally attributed to lord chief baron Gilbert, and

comprises a most copious and excellent treatise on a very difficult and extensive subject.

(6) 2. H. 5. 7. by *Astt.* Hal. MSS.

(7) [See Note 267.]

(8) Intratur H. 34. Eliz. Rot. 72. King and Beny.—Hal. MSS.

ters, and accordingly it was adjudged that where tenant in taile and he in the remainder in fee joyned in a grant of a rent charge by deed in fee, and after tenant in taile died without issue, the grantee dis- trained and avowed by force of a graunt from him in the remainder, and upon *non concessit*, the jury found the speciall matter, and it was adjudged for the avowant; for every one granted according to his estate and interest.

Leases for lives or yeares are of three natures: some be good in law; some be voydable by entry, and some voyd without entry. Of such as be good in law, some be good at the common law as made by tenant in fee, whereof *Littleton* here putteth his case: some by act of parliament; as tenant in taile, a bishop seised in fee in the right of his church alone without his chapter, a man seised in fee simple or fee taile in the right of his wife together with his wife (as hath beene said) may by deed indented make leases for 21 yeares or three lives in such manner and forme as hath been said and by the statute [d] is limited, all which were voydable by the common law when *Littleton* wrote, and now are made good by parliament.

[45. b.]

(3. Co. 64. b.)

[d] 32. H. 8.
cap. 28.(Plew. 264. b.
Cro. Ja. 173.)[e] 33. H. 8.
Dier. 3. Co. 59.
60. in Lincolne
Colledge case.
Hunt's case
vouched.
(1. Ro. Abr.
848.)

An infant seised of land holden in socage, may by custome make a lease at his age of 15 yeares, and shall binde him, which lease was voydable by the common law; (1) voydable, some by the common law, after the death of the lessor, as of tenant in taile, a bishop, &c. or after the death of the husband (intended of leases not warranted by the said statute of 32. H. 8.); some voydable by act of parliament, as by a bishop though it be confirmed by deane and chapter, if it be not warranted by the statute of 32. H. 8. and so of a deane and chapter after the death of the deane; some voydable at times by the lessor himselve or his heires, as by an infant and the like. Some voyde *in futuro*, and some voyde *in presenti*. *In futuro*, as if tenant in taile make a lease for yeares and die without issue, it is voyde, as to them in reversion or remainder, though it be made [e] according to the said statute. If a prebend, parson or vicar make a lease for yeares, it is voyde by death, if it be not according to the statutes. Otherwise it is of a lease for life, for that is voidable, *et sic de similibus*.

Some voyde *in presenti*; as if one make a lease for so many yeares as he shall live, this is voyde *in presenti* for the incertainty. *Et sic in similibus*, whereof *Littleton* himselve will teach you next and immediately, and I know you would now gladly heare him.

Pl. Com.
Wroteff. 198.
33. H. 8. tit.
exposition des
parols, 44.
2. Co. 145. in
Davenport's
case.
(5. Co. 7.
1. Co. 154. 274.
1. Ro. Abr. 849)
[f] 1. Co. 154.
in the Rector of
Chedington's
case.
[g] Vide Sect.
531.

"*Pur terme,*" *Pro termino*. *Terminus* in the understanding of the law doth not onely signifie the limits and limitation of time, but also the estate and interest that passeth for that time. As if a man make a lease for twenty one yeares, and after make a lease to begin à *fine et expiratione prædicti termini 21 annorum dimiss.* and after the first lease is surrendered, yet the second lease shall begin presently; but if it had beene to begin *post finem et expirationem prædicti 21 annorum*, in that case although the first terme had beene surrendered, yet the second lease should not begin till after the 21 yeares be ended by effluxion of time; and so note the diversitie betweene the terme for 21 yeares, and 21 yeares; and [f] herewith agreeth the lord *Page's* case.

[g] Words to make a lease be, demise, grant, to fearme let, be- take; and whatsoever word amounteth to a grant may serve to make a lease.

a lease. In the king's case [b] this word *Committo* doth amount sometime to a grant, as when he saith *Commisimus W. de B. officium seneschalsæ, &c. quamdiu nobis placuerit*, and by that word also he may make a lease: and [i] therefore *à fortiori* a common person by that word may doe the same.

“*De certaine ans.*” For regularly in every lease for yeares the terme must have a certaine beginning and a certaine end; and here-with [k] agreeth *Bracton*, *terminus annorum certus debet esse et determinatus*. And *Littleton* is here to be understood, first, that the yeares must be certaine when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent. Secondly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. ¶ If *A.* seised of lands in fee grant to *B.* that when *B.* payes to *A.* xx. shillings, that from thenceforth he shall have and occupie the land for 21 yeares, and after *B.* payes the xx. shillings, this is a good lease for 21 yeares from thenceforth. ¶ For the second, if *A.* leaseth his land to *B.* for so many yeares as *B.* hath in the mannor of *Dale*, and *B.* hath then a terme in the mannor of *Dale* for 10 yeares, this is a good lease by *A.* to *B.* of the land of *A.* for 10 yeares. ¶ If the parson of *D.* make a lease of his glebe for so many yeares as he shall be parson there, this cannot be made certaine by any meanes, for nothing is more uncertaine then the time of death, *Terminus vitæ est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis* (2). But if he make a lease for three yeares, and so from three yeares to three yeares, so long as he shall be parson, this is a good lease for 6 yeares, if he continue parson so long, first for three yeares, and after that for three yeares; and for the residue uncertaine (3).

¶ If a man make a lease to *I. S.* for so many yeares as *I. N.* shall name, this at the beginning is uncertaine; but when *I. N.* hath named the yeares, then it is a good lease for so many yeares.

¶ A man maketh a lease for 21 yeares if *I. S.* live so long; this is a good lease for yeares, and yet is certaine in uncertainty, for the life of *I. S.* is uncertaine. See many excellent cases concerning this matter put in the said case of the bishop of *Bath* and *Wells*. By the ancient law of *England* for many respects a man could not have made a lease above 40 yeares at the most, for then it was said that by long leases many were prejudiced, and many times men disinherited, but that ancient law is antiquated (1).

In the eye of the law any estate for life being, as *Littleton* hath said, an estate of freehold, against whom a *præcipe quoddam reddit* doth lye, is an higher and greater estate than a lease for yeares, though it be for a thousand or more, which never are without suspicion of fraud; and they were the lesse valuable, for that at the common law they were subject unto, and under the power of the tenant of the freehold, the learning whereof standeth thus, and is worthy to be knowne. When *Littleton* wrote, if a man had made a lease for yeares by writing, and he that had the freehold had suffered

[b] Register
F. N. B. 270. c.

[i] 8. H. 6. 34.

[k] 14. H. 8. 14,
3. Mar. leases
Br. 67. 2. Mar.
ibid. 67. Say
and Fuller's
case, Pl. Com.
273. and
Welden's case
ibid.

4. H. 6. 12.
21. H. 7. 38.
Vid. le case del
evesque de Bath.
6. Co. 34, 35.
Bract. lib. 2.
cap. 9. Vid. 1.
Co. 155, 156.
Rector de
Chedington's
case.
(1. Ro. Abr.
848, 849.)

Bract. lib. 2.
cap. 9. So re-
solved Hill. 26.
Eliz. Rot. 935.
in com. banco.

Pl. Com. Say
and Fuller's
case. Mirror,
ca 2. sect. 17.
& cap. 5.
sect. 1.

[46. a.]

(2) [See Note 269.]

[46. a.]

(3) [See Note 270.]

(1) [See Note 271.]

ferred himselfe to be impleaded in a reall action by collusion to bar the lessee of his terme, and made default, &c. the statute of *Glouc'* gave the lessee for yeares some remedy by way of receipt, and a triall whether the demandant did move the plea by good right or collusion; and if it were found by collusion, then the termor should enjoy his tearme, and the execution of the judgement should stay untill after the tearme ended (2). But this statute extended not to 5 cases. First, if the lease were without writing, for the words of this act are, (so that the termor may have recovery by writ of covenant.)

21. Co. 33.

2. It extended not but to a recovery by default (3). 3. The termor could not be relieved by this statute, unlesse he knew of the recovery, and were received, &c. 4. By the better opinion of bookes, it extended not to tenants by statute merchant, statute staple, or *elegit*. 5. Not to gardian. [1] But now the statute of 21. H. 8. doth give remedy in all the said cases saving the case of the gardian, and giveth them power to falsifie all manner of recoveries had against the tenants of the freehold upon fained and untrue titles, &c. Now the [n] statute saith, that it was a doubt before that statute whether a termor for yeares might falsifie or no: but yet it seemeth by the better opinion of books in so great variety, that he having but a chattell, was not able by the common law to falsifie a covenous recovery of the freehold, because he could not have the thing that was recovered (4). [n] And *Thirning* and *Hankford* doe hold that a gardian is not within the statute of *Glouc'*.

[1] 21. H. 8. cap. 15.

[m] That a termor might falsifie at the Common Law vid. 19. E. 3. Aff. 82.

21. E. 3. 1.
7. H. 7. 11. b.
1. H. 7. 9. b.
Pl. Com. 83.
10. E. 3. 46.
19. E. 3. rescit 112.
That he could not. 30. H. 6.
Fauxer recovery 9. 43. Aff. 41.
26. H. 8. 2.
9. E. 4. 38.
F. N. B. 198. E.
14. H. 8. 4.
9. Co. fo. 135.
Afcoughe's case.
[n] 7. H. 4. 12.
33. H. 8. Dier.
32.

¶ If two coparceners be, and one of them let her part to another for yeares, and after upon a writ of partition brought against the lessor too little is allotted to the lessor, it is holden by some that the lessee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition shall remaine firme and stable. ¶ But if there be two coparceners of three acres of land, every one of equal value, and the one coparcener letteth her part, and after make partition, and one acre is allotted onely to the lessor, the lessee is not bound hereby, but he may enter and take the profits of another half acre, for that of right belongs unto him (5). Thus much have I thought good to set downe, for it sufficeth not to know what the law is in these cases, unlesse he understand the reason and cause thereof.

And albeit (as hath beene said) a lease for yeares must have a certaine beginning, and a certaine end, yet the continuance thereof may be incertaine, for the same may cease and revive againe in divers cases (6). ¶ As if tenant in taile make a lease for yeares reserving xx. shillings, and after take a wife and dye without issue, now as to him in the reversion the lease is meerly void: but if he indow the wife of tenant in taile of the land, (as she may be though the estate taile be determined) now is the lease as to the tenant in dower (who is in of the state of her husband) [a] revived againe as against her, for as to her the estate taile continueth, for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law. ¶ So it is if tenant in taile make a lease for yeares

(7 Co. 9. a.
1. Ro. Abr.
342.)
[a] 10. E. 3. 26.
34. Aff. 15.
23. E. 3.
Dower 130.
(7. Co. 8. b.)

(2) [See Note 272.]
(3) Or reddition. 16. H. 7. 5. 21. H. 7.
25. 5. H. 7. 39. 8. H. 7. 6. 12. H. 8. 7.
27. H. 8. 7. 11. E. 4. 10. or on nihil dicit,
or disclaimer. 5. E. 4. 37. by Danby, or
on default of the voucher at the grand cape or

sequatur sub periculo. 9. E. 4. 38. Hal.
MSS.

(4) [See Note 273.]
(5) [See Note 274.]
(6) Vid. 7. Rep. the earl of Bedford's
case. Hal. MSS.

ut supra, and dyeth without issue, his wife enseint with a sonne, he in the reversion enter, against him the lease is void, but after the sonne be borne the lease is good, if it be made according to the [b] statute, and otherwise is voydable.

[b] 32. H. 8.
ca. 28.

The king made a gift in taile of the mannor of *Eastfarleigh* in *Kent*, to *W.* to hold by knights service; *W.* made a lease to *A.* for thirty-fixe yeares, reserving thirteene pound rent; *W.* died, his sonne and heire of full age. All this was found by office. As to the king this lease is not of force, for he shall have his *primer seisin*, as of lands in possession, but after livery, the lessee may enter; and if the issue in taile accept the rent, the lease shall binde him, for the king's *primer seisin* shall not take away the election of the issue in taile, for it may be that the rent was better than the land: [c] and so it was adjudged in *Austen's* case, as I had it of the report of master *Edmond Plowden*, a grave and learned apprentice of law.

(1. Ro. Abr. 842.)
[c] Pasch. 2. & 3. Ph. & Mar. in an information of Intrusion in the Exchequer against Austen. Vid. Dier. Pasch. 2. & 3. Ph. & Mar. 115. 13. Eliz. ca. 10. [d] 6. E. 6. Dier 72. (Cro. Car. 552.) 17. E. 3. 52. 17. Ass. p. 17. 2. R. 3. 20. 9. H. 6. 33. (Hob. 7.)

If tenant in fee take wife, and make a lease for yeares, and dieth, the wife is endowed, she shall avoid the lease, but after her decease the lease shall be in force againe. But if the patron grant the next avoydance, and after parson, patron, and ordinary, before the statute, [d] had made a lease of the glebe for yeares, and after the parson dieth, and the grantee of the next avoydance had presented a clerke to the church, who is admitted, instituted, and inducted, and dieth within the terme; the patron presents a new clerke, and he is admitted, instituted, and inducted, albeit he commeth in under the patron that was party to the lease, yet because the last incumbent, who had the whole state in him, avoyded the lease, it shall not revive againe, no more than if a feme covert levy a fine alone, if the husband enter and avoyd the fine, and dye, the whole estate is so avoyded as it shall not binde the wife after his death (7).

(Hob. 225.
10. Co. 43.)

[46. b.]

If a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent dye, yet is the appropriation wholly dissolved, because the incumbent, which came in by presentation, had the whole state in him; and so was it adjudged, as the case is to be intended (1).

2. E. 3. 8.
per Scroope.
(1. Ro. Abr. 240, 241.)

① Tenant in taile make a lease for forty yeares, reserving a rent, to commence ten yeares after; tenant in taile dye; the issue enter and enfeoffe A.; ten yeares expire, the lessee enter: if A. accept the rent, the lease is good, for he shall have the same election that the issue in taile had, either to make it good, or to avoid it, so as it could not be precisely affirmed, whether by the entry of the issue this executory lease was avoided, but it dependeth incertainly upon the will of the feoffee (2). But now I know you are desirous to heare *Littleton*, who is speaking to you.

Pl. Com. 437. 2.
(1. Ro. Abr. 831, 842, 843.
1. Sid. 260,
261.)

“Et quant le lessee enter per force del lease, donques il est tenant pur terme des ans.” And true it is, that to many purposes he is not tenant for yeares until he enter (3) As a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privity Neither can the lessor grant away the reversion by the name of the reversion,

(2. Ro. Abr. 403.
Cro. Car. 110.
400.)

V. Sect. 451,
455.

before

(7) Adjudged accordingly Cro. Cha. Plowden v. Oldford 582. But in Hill. 10. Eliz. C. B. E. 238. adjudged that the lease remained. Polydore Virgil's case. Hal. MSS.

[46. b.]

(1) [See Note 275.]

(2) [See Note 276.]

Lib. i. Cap. 7. Of Tenant for yeares. Sect. 58:

(Cro. Ja. 60.
5. Co. 124.)

before entry. *Vide* Sect. 567. But the lessee before entry hath an interest, *interesse termini*, grantable to another. *Vide* Sect. 319. And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this Chapter. And so if the lessee dyeth before he entred, yet his executors or administrators may enter, because he presently by the lease hath an interest in him: and if it be made to two, and one dye before entry, his interest shall survive. *Vide* Sect. 281.

V. Sect. 665.
more fully of
this matter.
(Hob. 3.)

2 He that hath a lease for yeares, hath it either in his owne right, whereof *Littleton* hath here spoken, or in another's right, and that in divers manners; as a man may have a terme for yeares in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife: but of this in another place more fully.

(1. Ro. Abr.
344, 345.
Plow. 191.)

3 If a man be possessed of a terme of forty yeares in the right of his wife, and maketh a lease for twenty yeares, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease (3). So note, a disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a summe of money to his executors, &c. the husband die, the condition is broken, the executors enter, this is a disposition of the terme, and the wife is barred thereof, for the whole interest was passed away (4).

Hil. 17. El. in
the king's bench.
(Post. 351.
10. Co. 51.
Hutt. 17.)

4 If a lease be made to a baron and feme for terme of their lives, the remainder to the executors of the survivor of them, the husband grant away this terme and dieth, this shall not barr the wife, for that the wife had but a possibility, and no interest.

37. Ass. p. 11.
Pl. Com. 418. b.
(1. Ro. Rep.
359.)

5 If the husband and wife be ejected of a terme in the right of his wife, and the husband bring an *ejectione firme* in his owne name (5), and have judgement to recover, this is an alteration of the terme, and vesteth it in the husband (6).

If a lease for yeares be made to a bishop and his successors, yet his executors or administrators shall have it *in auter droit*, for regularly no chattell can goe in succession in a case of a sole corporation, no more then if a lease be made to a man and his heires it can goe to his heires. But let us returne to *Littleton* (7).

5. Co. 1.
Clayton's case.

12. Eliz.
Dyer 286.

(2. Ro. Abr.
520. Cro.

Ja. 135.
Post. 255. a.)

14. El. Dy. 307.

5. El. Dy. 218.

(1. Ro. Abr. 849,
850. Cro. Cha.
78.)

Touching the time of the beginning of a lease for yeares, it is to be observed, that if a lease be made by indenture, bearing date 26 *Maii*, &c. to have and to hold for twenty one yeares, from the date, or from the day of the date (8), it shall begin on the twenty seventh day of *May*, (9). If the lease beare date the twenty sixt day of *May*, &c. to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be *à die confessionis*, then it shall begin on the next day after the deliverie. If the *habendum* be for the terme of twenty one

(3) [See Note 277.]

(4) [See Note 278.]

(5) [See Note 279.]

(6) [See Note 280.]

(7) *Hic. fol. 9. a.* Hal. MSS.

(8) [See Note 281.]

(9) [See Note 282.]

one yeares, without mentioning when it shall begin, it shall begin from the deliverie, for there the words take effect, as is aforesaid. If an indenture of lease beare date which is void or impossible, as the thirtieth day of *Februarie*, or the fortieth of *March*, if in this case the terme be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all [a] And so it is, if a man by indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in point materiall which is *in esse*, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the deliverie thereof (10).

"*Et si le lessor en tiel case reserve a luy un annual rent sur tiel lease il poet eslier a distreyner pur le rent, ou il poet aver action de debt pur les arerages.*"

[47. a.]

"*Reserve a luy un annual rent, &c.*" First, it appeareth [b] here by *Littleton* that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distreine, as *Littleton* here also saith, and therefore a rent cannot be reserved by a common person (1) out of any incorporeall inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, privileges, franchises, and the like. [c] But if the lease be made of them by deed (2) for yeares, it may be good by way of contract to have an action of debt, but distreine the lessor cannot. Neither shall it passe with the grant of the reversion, for that it is no rent incident to the reversion (3). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (4). But if a man demiseth the vesture or herbage of his land, he may reserve a rent for that the thing is maynorable, and the lessor may distreine the cattell upon the land (5): and so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession (6), and they are tenements within the words of *Littleton*.

14. E. 3. Scir. fac. 122. 5. E. 3. 68. 17. E. 3. 75. 11. H. 4. 40. 3. H. 6. 21. 45. 10. H. 6. 12. 21. H. 6. 11. 5. H. 7. 39. 21. H. 7. 19. 17. E. 2. Ex. 112. 23. El. Dyer 377.

[a] It appeareth by *Littleton*, that *reservando* is an apt word of reserving a rent, and so is *reddendo*, *solvendo*, *faciendo*, *inveniendo*, *dummodo*, and the like (7).

31. Aff. p. 30. 3. Aff. 9. 26. Aff. 66. 32. E. 3. Br. 291. 8. E. 4. 8. 10. El. Dy. 276. Pl. Com. en Browning and Beeston's case, fo. 131, 132, &c.

[b] And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) for which, *exceptis*, *salvo*, *preter*, and the like, be apt words; and a reservation which is alwaies of a thing not *in esse*, but newly created or reserved out of

3. H. 6. 45. 10. H. 6. 8. 41. 33. H. 6. 1. 35. H. 6. 34. 17. Aff. 14. H. 8. 1. 44. E. 3. 43. Pl. Com. 361.

(10) [See Note 283.]

[47. a.]

(1) [See Note 284.]

(2) [See Note 285.]

(3) [See Note 286.]

(4) [See Note 287.]

(5) *Quære, how assise shall be brought in case of herbage.* 17. E. 3. 75. Hal. MSS.

(6) [See Note 288.]

(7) [See Note 289.]

2. Co. 3. Goddard's case.

[a] Pl. Com. 148. 3. E. 6. tit. Leafes Br. 62. 3. El. Dy. 195. 1. Mar. Dyer 116.

(Cro. Car. 400. 2. Ro. Abr. 52. 1. Ro. Abr. 849. 1. Sid. 460.)

(b) 7. Co. 23. But's case. 10. Co. 59, 60. (Cro. Ja. 173. Post. 142. a. 144. a.

5. Co. 3. 2. Saund. 303. 2. Ro. Abr. 446. 5. Co. Mountjoy's case. Noy 60.)

[c] 30. Aff.

P. 5. 12. Aff. 20. 20. H. 4. 10. 1. H. 4. 1, 2, 3. 11. H. 4. 82. 19. E. 2. Fines 126. 44. E. 3. 45. 9. Aff. 24. 26. Aff. 60.

3. H. 6. 21. 45. Ex. 112. 23. El.

[a] 40. E. 3. 47.

8. E. 3. 67.

21. E. 4. 62.

3. H. 6. 45.

10. El. Dy. 276. Pl.

[b] 50. E. 3. 12.

13. Aff. 9.

38. E. 3. 10.

21. E. 3. 4.

34. Aff. 11.

29. E. 3. 14.

44. E. 3. 43.

[c] Braçt. li. 2. the land or tenement demised. [c] *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* [d] But out of a generall a part may be excepted, as out of a mannor, an acre, *ex verbo generali aliquid excipitur*, and not a part of a certainty, as out of twenty acres one.

[e] It is further to be observed, that the lessor cannot reserve to any other but to himselfe, for *Littleton* saith, *reserve a luy*, reserve to himselfe. [e] If two jointenants be, and they make a lease for yeares by paroll, or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion.

[f] *Littleton* here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him and his heires, for otherwise the rent shall determine by his death, if he die within the terme (8). [g] But if he reserve a rent generally without shewing to whom it shall goe, it shall go to his heires. If he reserve a rent to him and his assignes, yet the rent shall determine by his death, because the reservation is good but during his life. So it is if he reserve a rent to him and his executors it shall end by his death, because the heire hath the reversion, and the rent was incident to the reversion (9). So if a man warrant land to B. and his assignes, the assignee must vouch during the life of B. for the warrantie continues but only during the life of B. for the warranty is but for life, for want of words of inheritance. But if the warranty be to B. his heires and assignes, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heires and assignes, so as it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same.

"Annual rent." So it is if the rent be reserved every two or three or more yeares (10). Of rents *Littleton* doth excellently treat hereafter in this Chapter of Rents, and therefore in this place thus much shall suffice.

[b] 14. H. 8. 25. "A distreyner par le rent." Here it is necessary to be seene of what things a distresse may be taken for a rent, and how the distresse ought to be demeaned. [b] 1. It must be of a thing whereof a valuable propertie is in some body, and therefore dogs, bucks, does (11), conies, and the like that are *fera natura* (12) cannot be distreynd. 2. Although it be of valuable propertie, as a horse, &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time privileged and cannot be distreynd (13). [i] 3. Valuable things shall not be distreined for rent for benefit and maintenance of trades, which by consequent are for the common wealth, and are there by authority of law, as a horse in a smith's shop shall not be distreynd for the rent issuing out of the shop, nor the horse, &c. in the holly, nor the materials in the weaver's shop for making of cloth, nor cloth or

(8) [See Note 290.]

(9) [See Note 291.]

(10) See further as to reservation of rent,
Vin. Abr. title *Reservation*, and Gilb.

Treat. on Rents.

(11) [See Note 292.]

(12) [See Note 293.]

(13) [See Note 29.]

or garments in a taylor's shop (14), nor sacks of corne or meale in a mill, nor in a market, nor any thing distrayned for damage *feasant*, for it is in custody of law, and the like.

[k] 4. Nothing shall be distrayned for rent, that cannot be rendered againe in as good plight as it was at the time of the distresse taken (15); as sheaves or flockes of corne or the like cannot be distrayned for rent (16), but for damage *feasant* they may be distreynd (17). But charretts or carts with corne may be distreynd for rent, for they may be safely restored.

[l] 5. Beasts belonging to the plow (18), *averia caruæ*, shall not be distreynd (which is the ancient common law of England, for no man shall be distreynd by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the bookes of a scholler) while goods or other beasts, which *Bracton* calls *animalia* (or *catella*) *otiosa*, may be distrained. [m] 6. Furnaces, caudrons, or the like, fixed to the freehold, or the doores or windowes of a house, or the like cannot be distrained (1). [n] Lastly, beasts that escape (2) may be distrained for rent, though they have not been *levant* and *couchant* (3). [o] Note, that he that distraines any thing that hath life, must impound them in a lawfull pownd within three miles in the same county, and that is either overt or open, in a pinfold made for such purposes, or in his owne close, or in the close of another by his consent (4). And it is there called open, because the owner may give his cattle meat and drinke without trespassse to any other, and then the cattle must be sustained at the perill of the owner. [p] Or it is a pownd covert or close, as to impownd the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore. But if the distresse be of utensils of household, or such like dead goods which may take harme by wet or weather, or be stolne away, there he must impownd them in a house or other pownd covert within three miles within the same county, for if he impownd them in a pownd overt he must answer for them.

cap. 4. W. 1. cap. 16. 2. & 3. Ph and Mar. cap. 13. Fleta, lib. 2. cap. 20. 242. 30. Aff. 38. 1. H. 6. 9. 22. E. 4. 11. F. N. B. 89. Doct. and Stud. lib. 2. cap. 27. 5. H. 7. fol. 9. [p] 33. H. 8. tit. d. fref. Br. 65. (1. Ro. Abr. 673.)

[q] If the distresse be taken of goods without cause, the owner may make rescous; but if they be distrained without cause, and impounded, the owner cannot breake the pownd and take them out, because they are then in the custody of the law.

[r] But if a man distraine cattle for damage *feasant*, and put them in the pownd, and the owner that had common there make fresh suite, and finde the doore unlocked (5), he may justifie the taking away of the cattle in a *parco fracto*. [s] If the owner breake the pownd, and take away his goods, the party distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wheresoever he find them, and impownd them againe.

It

(14) [See Note 295.]
 (15) 20. H. 7. 9. 13. 21. E. 4. 47.
 Hal. MSS.
 (16) [See Note 296.]
 (17) [See Note 297.]
 (18) [See Note 298.]
 Vol. I.

[47. b.]

(1) [See Note 299.]
 (2) [See Note 300.]
 (3) [See Note 301.]
 (4) [See Note 302.]
 (5) [See Note 303.]

[k] 18. E. 3. 4. a.
 11. H. 7. 14. a.
 21. H. 7. 39. b.
 22. E. 4. 50. b.
 2. H. 4. 15.
 (1. Ro. Abr. 667.)

[l] Okeham 38,
 39. Bra. lib. 4.
 f. 217.
 F. N. B. 90. a.
 Reg. 97.
 Flet. lib. 2.
 ca. 41.
 Mirr. ca. 2.
 Sect. 15, 16.
 4. E. 3. 1.
 29. E. 3. 17.
 [m] 21. H. 7. 26.
 3. E. 3.
 Aff. 46. 9.
 [n] 7. H. 7. 1. b.
 10. H. 7. 21.
 11. H. 7. 4. a.
 15. H. 7. 17.
 18. E. 2.
 avowrie 219.
 6. E. 4.
 22. E. 4. 49.
 4. E. 3.
 distref. 18.
 27. E. 3. 80.
 2. H. 4. 16.
 (2. Leon. 7.
 Doct. and Stud.
 lib. 2. c. 27.)
 [o] Marlebr.

6. H. 3. avowrie
 lib. 2. cap. 27.
 [q] 4. E. 6.
 tit. distref. 74.
 F. N. B. 100. E.
 (Post. 160. b.)

[r] 3. E. 3. tit.
 transf. 11.

[s] 34. H. 6.
 18.

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[r] Regit.
F. N. B. 100,
101.

It is called a writ *de parco fracto* of these words in the writ [r], *Parcum illum vi et armis fregit*. And the forme thereof appeares in the *Register* and *F. N. B.*

(Doct. and Stud.
lib. 2. cap. 9.)

But it is to be observed, that for the rent due the last day of the tearme, the lessor cannot distraine, because the terme is ended (6); and therefore some use to reserve the last halfe yeare's rent at the feast of the nativitie of Saint *John Baptist* before the end of the terme, so as if the rent be not then paid, he may distraine betweene that and *Michaelmasse* following (7).

(1. Ro. Abr.
601. Post. 292.
b.)

“*Action de debt.*” Note a diversitie betweene a rent reserved upon a lease for yeares, reserving a yearely rent: the lessor may have severall actions of debt for every yeare's rent. But upon a bond or contract for payment of several summes, no action of debt lieth till the last day be past (8). But otherwise it is of a recognizance, which see at large and the reason thereof cap. Releases, Sect. 512, 513. [u] Note, that the lord shall not have an action of debt for relief or for escuage due unto him, because he hath other remedie; but his executors or administrators shall have an action therefore, because it is now become as a flower false from the stocke, and they have no other remedy. Neither shall the lord have an action of debt for aid *pur file marier*, or *faire fitz Chivaler*, for the cause aforesaid.

[u] 7. H. 6. 13.
4. Co. 49.
3. Co. 16.
34. E. 1. tit.
Avowrie 233.
32. H. 8.
Br. reliefe 11.
F. N. B. 82, 83.
Glanvil. lib. 9.
W. 1. cap. 35.

cap. 35. Eleta, lib. 2. cap. 40. and lib. 3. cap. 14. Bracton, lib. 2. fol. 36.
25. E. 3. cap. 11. Britton, fol. 57. & 70. (Post. 3. a. 1 Ro. Abr. 596.)

“*Mes en tiel case il convient, que le lessor soit seisie* (9) *de mesmes les tenements al temps del lease, car est bone plea pur le lessee a dire, que le lessor n'avoit riens en les tenements al temps del lease.*” And the reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*; and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter (10).

[x] 45. E. 3. 7.
20. E. 4. 10.
34. H. 6. 48.
35. H. 6. 34.
9. H. 6. 35.
11. H. 4. 22.
[y] 2. E. 2.
Eft. p. 253.
39. E. 3. 13.
Pl. Com. 434.
18. E. 3. 16.
15. E. 3.
Eftop. 236.
14. H. 4. 32.
(Mo. 20.)
[z] 14. H. 6. 23.
8. H. 4. 7.
[a] Resolve
Pateh. 2. Eft.
in Commun.
Banco.
(Cro. Cha. 110.)

“*Si* [x] *non que le lease soit per fait indent, &c.*” If the lease be made by deed indented, then are both parties concluded, [y] but if it be by deed poll the lessee is not estopped to say, that the lessor had nothing at the time of the lease made. *A. lessee for the life of B. makes a lease for yeares by deed indented, and after purchases the reversion in fee. B. dieth, A. shall avoid his owne lease, for he may confesse and avoid the lease which took effect in point of interest, and determined by the death of B.* But if *A. had nothing in the land, and made a lease for yeares by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say, that the lessor had nothing in the land* (11); and here it worketh only upon the conclusion, and the lessor cannot confesse and avoid, as he might in the other case. [z] If a man take a lease of his owne land by deed indented reserving a rent, the lessee is concluded. [a] But if a man take a lease of the herbage of his owne land by deed indented, this is no conclusion to say, that the lessor had nothing in the land,

(6) [See Note 304.]

(7) [See Note 305.]

(9) [See Note 306.]

(10) 18. E. 3. 16. Brief 747. Dy. 122.

(8) See New. Abr. Debt, B. and Vin. Martyne and Hardye. Hal. MSS.

(11) [See Note 307.]

Abr. Debt, O.

land, ~~because it was not made of the land it selfe~~: [b] but if a man take a lease for yeares of his owne land by deed indented, the estoppel doth not continue after the terme ended (12). For by the making of the lease, the estoppel doth grow, and consequently by the end of the ~~lease, the estoppel determines~~ (13), [c] and that part of the indenture which belonged to the lessee, doth after the terme ended belong to the lessor, which should not be if the estoppel continued.

[b] Mich. 31. & 32. Eliz. in Communi Banco adjudge in London's case.
[c] 38. H. 6. 24.
30. E. 3. 21.
(Post. 229, a.)

[48. a.]

Sect. 59.

E*T est ascavoir, que en lease pur terme de ans, per fait ou sans fait, il ne besoygne aucun liverie de seisin d'estre fait al lessee, mes il poit entrer quant il voet per force de mesme le lease. Mes des feoffments faits en pais, ou dones en le taile, ou lease pur terme de vie; en ziels cafes ou franktenement passera, si ceo soit per fait ou sauns fait, il covient aver un livery de seisin.*

AND it is to be understood, that in a lease for yeares, by deed or without deed (1), there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in taile, or lease for terme of life; in such cafes where a freehold shall passe, if it be by deed or without deed, it behoveth to have livery of seisin.

“**L**IVERIE de seisin.” (2) *Traditio, or deliberatio seisinæ*, is a solemnitie, that the law requireth for the passing of a freehold of lands or tenements by deliverie of seisin thereof. [b] *Intervenire debet solennitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis* (3).

18. E. 3. fo. 16.
41. E. 3. 17.
40. Aff. 10.
2. Aff. 1.
2. E. 3. 4.
43. E. 3.
Feoff. 51.
Pl. Com. 25. a.
& 303. b.
Vid. Sect. 66.
(Post. 216.)

And there be two kinds of livery of seisin, viz. a liverie in [c] deed, and a livery in law. (1) A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. per hostium et per hastam et annulum vel per fustem vel baculum, &c.

[b] Bract. lib. 2. ca. 15.
[c] Bract. lib. 2. ca. 15. & 18.
Brit. ca. 33.
in fine fo. 87.
Flet. lib. 3. cap. 15.
[d] 6. Co. 26.
Sharp's case.
[e] See of this more Sect. 60.
(2. Ro. Abr. 7.)

A. seised of an house in fee, and being in the house, [d] saith to **B.** I demise to you this house for terme of my life; this is a good beginning to limit the state, but here wanteth livery (4). A livery in deed may be done two manner of wayes. By a solemne act and words; as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with [e] these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe; and the feoffor saying, Here I deliver you seisin and possession

(12) [See Note 308.]

(13) [See Note 309.]

[48. a.]

(1) As to the distinction at common law between hereditaments lying in livery, which may be passed for any estate without deed or even writing, and those lying in grant, which could be transferred by deed only, and the alteration of our ancient law by the 29. Cha. 2. c. 3. which requires a deed or

writing in most cafes, see infra, n. 3. ante 9. a. and post. 49. a. 121. b. 169. a.

(2) For the origin and history of the transfer of lands by livery of seisin, see 2. Blackst. Comment. 311. Mad. Formul. Anglic. Dissert. 9. and Spelm. Gloss. and Du Fresn. Gloss. voce *Investitura*.

(3) [See Note 310.]

(4) 9. Rep. 13. *Thoroughgood's case*. Hal. MSS.

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41. E. 3. 17. b.
41. Aff. p. 10.
38. Aff. p. 2.
38. E. 3. 11.
39. Aff. p. 12.
26. Aff. 39.
27. Aff. p. 61.
18. E. 3. 16.
6. Co. 26.
Sharp's case.
(Post 37.
Cro. Jam. 80.)

43. E. 3. tit.
Feoff. 51.
33. H. 8.
Feoff. B.
(9. Co. 136. b.
1. Leon. 207.)

50. E. 3. Rot.
Parl. nu. 30.

(Post. 50. a.)
13. E. 3.
Bttop. 177.

Ibidem.
(2. Co. 246.
Post. 222.)
7. E. 4. 25.
29. Aff. 40.
10. Aff. 19.
43. Aff. 20.
(Hob. 171.
Plow. 155. 197.
1. Sid. 82.
2. Ro. Abr. 7.
1. Co. 127. 129.
Cro. Ja. 376.)
Mich. 33. & 34.
Eliz. in the
King's Bench
inter Hogge &
Croffe for lands
in London.
Vid. Pl. Com.
395.

* See more of
this Sect. 66.
11. H. 4. 71.
19. Aff. 9.
19. H. 8. 9. b.
(2. Ro. Abr. 8.
Post 359.
2. Sid. 61.)
Bridgewater's case.

session of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed; or by words without any ceremony or act (5); as, the feoffor being at the house doore, or within the house, Here I deliver you feisin and possession of this house, in the name of feisin and possession of all the lands and tenements contained in this deed; et sic de similibus: or, Enter you into this house or land, and have and enjoy it according to the deed: or, Enter into the house or land, and God give you joy: or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a liverie within the view, much more it shall upon the land (6). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of feisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of feisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of feisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it bene resolved by all the judges; and so of the like.

If divers parcels of land be conteyned in a deed, and the feoffor delivers feisin of one parcell according to the deed, all the parcels doe passe, albeit he saith not (in name of all, &c.) because the deed containeth all. And so if there be divers feoffees, and he make livery to one according to the deed, the land passeth to all the feoffees (7); and yet the plainer way is to say (in the name of the whole, or of all the feoffees) (8).

If a man make a charter in fee, and deliver feisin for life *secundum formam cartæ*, the whole fee simple shall passe, for it shall be taken most strongly against the feoffor. Note, that these words (*secundum formam cartæ*) are understood according to the quantitie and quality of the effectuall estate contained in the deed. If a man make a lease for yeares by deed, and deliver feisin according to the forme and effect of the deed; yet he hath but an estate for yeares, and the liverie is void, as *Littleton* saith. (So if A. by deed give land to B. to have and to hold after the death of A. to B. and his heires, this is a void deed, because he cannot reserve to himselfe a particular estate, and construction must be made upon the whole deed; and if livery be made according to the forme and effect of the deed, the livery also is void, because the livery referreth to a deed that hath no effect in law, and therefore it cannot worke *secundum formam et effectum cartæ* (1). And so it was adjudged, *et sic de similibus*. * And it is to be observed, that neither the feoffor being absent can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed, and not by parol, because it concerneth matter of freehold (2).

Vide Sect. 1. in *Bridgewater's case*, where a man hath a moveable estate of inheritance, for example there put, in 13 acres: the question is, where livery shall be made. First, if they be parcel of a mannor, they may passe by the name of the mannor; but if they be in grosse, then the charter of feoffment must be of 13 acres lying and being

(5) [See Note 311.]

(6) But Cro. Jam. 80. and Ley 2. seem *contra*.

(7) But if it be without deed nothing passes to the others. Dy. 14. 35. Hal. MSS.

(8) 15. E. 4. 18. 18. E. 4. 12. 18. H.

6. 9. 22. H. 6. 1. 40. E. 3. 40. Hal. MSS.

[48. b.]

(1) [See Note 312.]

(2) [See Note 313.]

being in the meadow of 80 acres, generally, without bounding or describing of the same in certaintie; and liverie of the seisin of any 13 acres allotted to the feoffee for a yeare *secundum formam cartæ* is a good livery to passe the content of 13 acres wheresoever the same lie in that meadow. In the second case, where one entire mannor is separate and divided, as is afore said, there is no question but the livery must be made of that mannor; but in the other case, where two manors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and liverie in that mannor which he is seised of in any one yeare *secundum formam cartæ*, and the next yeare in the other *secundum formam cartæ*: for there are two distinct manors, and severall estates in them (3).

Vide Sect. 1.

② A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land, (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly) and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* (4). And herewith agreeth *Bracton*: *Item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere*: and in another place he saith, *in seisinâ per effectum et*

③ *per aspectum*. But if either feoffor or the feoffee die before entry the livery is voyd (5). And livery within the view is good where there is no deed of feoffment. [a] And such a liverie is good albeit the land lie in another county. [b] A man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery. [c] A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to re-vest an ancient estate and right in the disseisee, &c. as shall be said hereafter more at large in the Chapter of Continuall Claime. And so note a liverie in law shall be

④ perfected and executed by an entry in law. [d] If a man be disseised, and make a deed of feoffment and a letter of attorney to enter and take possession, and after to make livery *secundum formam cartæ*, this is a good feoffment albeit he was out of possession at the time of the charter made (6), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor.

⑤ But if a man be disseised, and make a writing of a lease for yeares and deliver the deed, and after deliver it upon the ground, the second delivery is voyde, for the first delivery made it a deed, and for that the lease for yeares must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was voyde. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. ⑥ But if the lessor had delivered it as an escrowe, to be delivered as his deed upon the ground, this had bene good.

A man

38. E. 3. 11.
38. Ass. p. 2.
43. Ass. p. 20.
Temps H. 8. tit.
Feoffments
Br. 70.
18. E. 3. 16. b.
28. H. 8. F. 18.
9. E. 4. 39. per
Moyle. Bract.
lib. 2. cap. 18.
& lib. 4. fo. 225.
a.

(1. Co. 156.
Post. 253. a.)
[a] 9. E. 4. 39.
38. E. 3. 11.
[b] 9. E. 4. 28.
40. 5. H. 7. 9.
3. H. 6. tit.
Pleint 1.
11. H. 4. 32.
11. E. 3. Ass. 86.
[c] 38. Ass. p. 23.
[d] Hill. 37.
Eliz. Rot. 620.
in com. Banco,
inter Browne &
Terry adjud.
Dyer 16.
Eliz. 234.
3. Eliz.
Dyer 131.
(6. Co. 26.)

3. Co. 35.
inter Jennings
& Bragge.

(2. Co. 31. b.
3. Co. 35. b.)

(3) [See Note 314.]

(4) [See Note 315.]

(5) 1. Rep. rector of Cheddington's case.

Hal. MSS.

(6) [See Note 316.]

(2. Ro. Abr.
4 Dy. 33. a.
Mo. 11.)

2. Co. 31, 32.
Bettisworth's
case.

7. E. 4. 20. a.
per tous les Just.
11. H. 4. 71.
Pl. Com. 152.
10. E. 4. 3.

(Mo. 99.)

2. Co. 35, 36.
Sir R. Hey-
ward's case.
(1. Sid. 25, 26.
82. 8. Co. 94.
3. Leo. 371.)
1. R. 3. ca. 1.
21. H. 7.

Ⓢ A man makes a lease for yeares and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is voyd; for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also (7); but if the lessee be absent, and hath neither wife nor servants (though he hath cattell) upon the ground, the livery of seisin shall be good.

If a man be seised of an house, and of divers severall closes in one countie in fee, and makes a lease thereof for yeares, and afterward maketh a feoffment in fee of the same, and makes liverie of seisin in the closes (the lessee or his wife or servants then being in the house) the livery is voyd for the whole: for the lessee cannot be upon every parcell of the land to him demised, for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole from being ousted or dispossessed (8).

Note a great diversity, when a man hath two waies to passe lands, and both of the waies be by the common law, and he intendeth to passe them by one of the wayes, yet *ut res magis valeat* it shall passe by the other. But where a man may passe lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise (1). For example, if a man be seised of two acres in fee, and letteth one of them for yeares, and intending to passe them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession, in name of both, onely the acre in possession passeth by the livery; yet if the lessee attorne, the reversion of that acre shall passe by the deed and attornement, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in by the statute in another degree, viz. in the *post*, and the intention of the parties worke much both in the raising and direction of uses. So if *cestuy que use* and his feoffees had joyned in a feoffment after the statute of 1. R. 3. &c. it had bene the feoffment of the feoffees, and the confirmation of *cestuy que use*, for the state at the common law shall be [preserved.] So to conclude this point; of freehold and inheritances, some be corporeall, as houses, &c. lands, &c. these are to passe by liverie of seisin, by deed or without deed; some be incorporeall, as advowsons, rents, commons, estovers, &c. these cannot passe without deed, but without any liverie (2). And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornement of the lessee by the deed doth passe, which is in lieu of the livery. See *Braet.* lib. 2. cap. 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuita translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo aicitur, quod res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inhaeret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.*

[49. a.]

This

(7) [See Note 317.]
(8) [See Note 318.]

[49. a.]

(1) [See Note 319.]

(2) See ante 9. a. 47. a. 48. a. and post.
121. b. and 169. a.

This ancient manner of conveyance by feoffment and livery of seisin, doth for many respects exceed all other conveyances. For (as hath beene said) (3) if the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce cleerely the estate of the feoffee, and make a perfect tenant of the freehold, but onely livery of seisin upon the land: the other conveyances being made off from the ground, doe sometimes more hurt then good, when the feoffor is out of possession (4). And yet in some cases a freehold shall passe by the common law without livery of seisin; as if a house or land belong to an office, by the grant of the office by deed, the house or land passeth as belongeth thereunto. So if a house or chamber belong to a corodie, by the grant of a corodie, the house or chamber passeth. A freehold may by custome be surrendred without livery, as hereafter shall be said (6): and so of assignement of dower *ad optium ecclesie*, or otherwise, and by exchange a freehold may passe without livery, as hereafter shall be said in this Chapter.

2. Co. 55.
Buckler's case.

1. H. 7. 28.
8. H. 7. 4.
31. H. 6. 16.
8. H. 7. 4. M.
31. E. 1. coram
Rege. Ranulph.
Huntingfel's
case. (5)
3. E. 3. Coron.
310. 11. H. 4.
83. V. Sect. 74.

Sect. 60.

MES si home lessa terres ou tenements per fait ou sans fait (7) a terme des ans, le remainder ouster a un auter pur terme de vie, ou en taile, ou en fee; dunque en tiel case il covient, que le lessor fait un liverie de seisin a le lessee pur terme des ans, ou autrement riens passa a eux en le remainder, coment que le lessee enter en les tenements. Et si le termor en tiel case entra devant ascun liverie de seisin fait a luy, dunque est le franktenement et auxy le reversion en le lessor. Mes si il fait liverie de seisin a le lessee, dunque est le franktenement ove le fee a eux en le remainder, solongue le forme del grant et le volunt del lessor.

BUT if a man letteth lands or tenements by deed or without deed for terme of yeares, the remainder over to another for life, or in taile, or in fee; in this case it behooveth, that the lessor maketh livery of seisin to the lessee for yeares, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entreth before any liverie of seisin made to him, then is the freehold and also the reversion in the lessor. But if he maketh liverie of seisin to the lessee, then is the freehold together with the fee to them in the remainder, according to the forme of the grant and the will of the lessor.

“**P**ER fait ou sauns fait.” For seeing that the remainders take effect by livery, there needes no deed (8.)

22. H. 6. 1.
10. E. 4. 1.
18. E. 4. 13.
(Plow. 25. a.
Post. 143. a.
Vaugh. 269.)

“Le remainder” is a residue of an estate in land depending upon a particular estate, and created together with the same, and in law Latine it is called remainder (9).

“Fait un liverie de seisin al lessee.” This livery is not necessary in this case for the lessee himselfe, because he hath but a terme for yeares, but it is for the benefit of them in the rem’, so as the livery

to

(3) Ante 9. a.

(4) [See Note 320.]

(5) Rot. 74. Hal. MSS.

(6) [See Note 321.]

(7) Un pur, L. and M.

(8) 12. H. 4. 20. Hal. MSS.

(9) Sect. 215. Hal. MSS.

to the lessee shall enure for the benefit of them in the rem^r: for the livery of the possession could not be made to the next in remainder, because the possession belonged to the lessee for yeares; and for that the particular terme and all the remainders made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee. (1) But if a lease for yeares without deed be made to *A.* and *B.* the remainder to *C.* in fee, and livery is made to *A.* in the absence of *B.* in the name of both; it seemeth the livery is good to vest the remainder: and there is a diversity between two joynt attornies to receive livery for another, and livery and seisin is made to one of them in the name of both, this is clearly void, because they had but a meer and bare authority (1), and they both doe in law make but one attorney, unless the warrant be joyntly and severally (2), but the lessee for yeares hath an interest in the land. Againe, if *A.* is to make a feoffment to *B.* and *C.* and their heires without deed, and *A.* makes livery to *B.* in the absence of *C.* in the name of both, and to their heires; this livery is void to *C.* because a man being absent cannot take a freehold by a livery, but by his attorney being lawfully authorised to receive livery by deed, unless the feoffment be made by deed, and then the livery to one in the name of both is good (4).

Note, there is a diversity between livery of seisin of land, and the delivery of a deed; for if a man deliver a deed without saying of any thing, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land) and the feoffee laying his hand on it, the feoffor say to the feoffee, Here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the forme and effect of the deed (as hath been said); and if it be without deed, then the words may be, Here I deliver you seisin of this house or land, &c. to have, and to hold to you for life, or to you and the heires of your body, or to you and your heires for ever, as the case shall require.

When the kinsman of *Elimelech* gave unto *Boas* the parcell of land that was *Elimelech's*, he tooke off his shoe, and gave it unto *Boas* in the name of seisin of the land (after the manner in *Israel*) in the presence and with the testimony of many witnesses. And when *Ephron* infeoffed *Abraham* of the field of *Machpelah*, he said to him, *Agrum trado tibi*, &c. I deliver this field to thee.

A man makes a lease for yeares to *A.* the remainder to *B.* in fee, and makes livery to *A.* within the view; this livery is void, for no man can take by force of a livery within the view, but he that taketh the freehold himselfe.

“*Et si le tenor en tiel case enter devant ascun livery fait, &c.*” By the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est, amplius meum esse non potest*. But if the lessor and lessee come upon the ground, or purpose for the lessor to make, and for the lessee to take livery, there his entry vests no actual possession in him untill livery

(Post. 143. a.)

(5. Co. 94. b.)

10. E. 4. 1.

12. E. 4. 16.

15. E. 4. 18.

22. E. 4. 35.

40. E. 3. 10.

41. (3)

Tem. H. 8.

Feoff. ents 72.

6. H. 4. 2 b.

Lit. 153.

3. H. 7. 13.

(Post. 359. a.)

(Ante 36. a.)

9. Co. 137.)

Ruth cap. 4.

verse 7, 8.

Deut. 25. 9, 10.

Gen. 23.

verse 11.

(Mo. 14.)

(1) See further as to the difference between a naked authority and an authority coupled with an interest, post. 52. b. 113. a. and 181. b.

(2) See post. note 1. in 52. b.

(3) 18. L. 4. 12.—Hal. MSS.

(4) Dy. 14. 35. 18. H. 6. 9. 22. H. 6. 1.—Hal. MSS.

livery be made; for [a] *affectio tua nomen imponit operi tuo* (5). And therefore if it be agreed betweene the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee entred into the land, and delivereth the release to the disseisor upon the land, this is a good release, and the entry of the disseisee, being for this purpose, did not avoid the disseisin, for his intent in this case did guide his entry to a speciall purpose. And so was it resolved [b] by sir James Dyer, and the whole court of common pleas, *Pasch.* 18. *Eliz.* upon evidence which I myselfe heard and observed. But if the disseisor enfeoffe the disseisee and others, there albeit the disseisee came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgement of law, as shall be said more at large in the Chapter of Remitter in his proper place.

[a] Bracton,
lib. 1.

[b] P. 19. *Eliz.*
in *Communi*
Banc. Pl. Com.
in *Aff. de fresh-*
force 91.
29. *Aff.* 26.
43. *Aff.* p. 3.
3. *H.* 6. 19. in
formedon. (6)

[50. a.]

Sect. 61.

ET si home voile faire feoffment, per fait ou sans fait, de terres ou tenements que il ad en plusors villes en un countie, le liverie de seisin fait en un parcel de les tenements en un ville, en le nosme de tous, suffist pur tous les autres terres et tenements comprehendes deins mesme le feoffment en toutz les autres villes deins mesme le countie. Mes si home fait un fait de feoffment des terres ou tenements en divers counties, la il covient en chescun countie aver un liverie de seisin.

AND if a man wil make a feoffment, by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of seisin made in one parcell of the tenements in one towne, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in al other the townes in the same countie (1). But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin (2).

“*EN un countie.*” A countie is fetched from the *French*, and sh. re from the *Saxon*. For *scyran* in the *Saxon* tongue signifieth *partiri*, because everie countie or shire is divided and parted by certaine metes and bounds from another, and in *Latine* is called *Comitatus*, à *comitando*, for accompanying together. And for as much as the men of one county doe not accompany together with-men of another county at countie courts, turnes, leets, and other courts, therefore in judgement of law they shall take no notice of a liverie in another countie to passe any lands in their owne countie. But of this more shall be said hereafter.

(5) [See Note 322.]

(6) 9. *H.* 7. 1. 41. *E.* 3. 17. Hal.
MSS.

[50. a.]

(1) [See Note 323.]

(2) [See Note 324.]

Sect. 62.

ET en ascun cas home avera per le grant d'un auter fee simple, fee taile, ou franktenement sans livery de seisin. Sicome deux homes sont, et chescun d'eux est seise d'un quantitie de terre deins un countie, et l'un granta sa terre a l'auter en eschange pur la terre que l'auter ad, et en mesme le manner l'auter granta sa terre a le primer grantor en eschange pur la terre que le primer grantor ad; en ceo case chescun poit entrer en l'autre terre, issint mise en eschange, sans ascun liverye de seisin; et tiel eschange fait per parolx de tenements deins mesme le countie sans escript est assets bone.

AND in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin (1); and such exchange made by paroll of tenements within the same county without writing is good enough (2).

(4. Co. 121.)
45. E. 3. 21.
3. E. 4. 10.
9. E. 4. 21.
7. H. 4. 1.
8. H. 7. 4.
28. H. 6. 2.

Vide Sect. 1.

HERE Littleton putteth a case where freehold, &c. shall passe without liverye of seisin, and thereupon putteth the case of an exchange of lands in one countie that is good by deed or without deed, without any livery, but if it be in severall counties there must be a deed. Also of things that lye in grant, as advowsons, rents, commons, &c. an exchange of them, albeit they be in one countie, is not good, unlesse it be by deed; and therefore Littleton putteth his case warily of land. And in case of a fine, which is a feoffment of record, of a devise by a last will, of a surrender, of a release or confirmation to a lessee for yeares, or at wil. In all these and some other cases a freehold, &c. (as hath beene said) may passe without livery. But this word (*eschange*) which our author here useth, is so appropriated by law to this case, as it cannot be expressed by any periphrasis or circumlocution (3).

[50. b.]

9. E. 4. 38, 39.
45. E. 3. 20, 21.
45. E. 3.
Exchange 10.

"En ceo case chescun poit enter, &c." For by the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the same by entry; and therefore if one of them dyeth before the exchange be executed by entrie, the exchange is void; for the heire cannot enter and take it as a purchaser, because he was named onely to take by way of limitation of estate in course of discent.

Sect. 63.

ET si les terres ou tenements soient en divers counties, c'est ascavoir, ceo que l'un ad est en un countie, et ceo que l'auter ad est en auter countie, la

AND if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in

(1) [See Note 325.]

(2) [See Note 326.]

(3) See acc. post. 51. b. and Willf. vol. 2. part 3. page 491. 496.

*la il covient de aver un fait indent
d'estre fait enter eux de tiel eschange.*

in another county, there it behoveth
to have a deed indented made be-
tweene them of this exchange.

THIS is evident enough. But of what things an exchange
may be made (which was a conveyance frequent in former (Hob. 41.)
times) is to be seene: and herein many things are to be ob-
served.

First, that the things exchanged [a] need not to be *in esse* at the
time of the exchange made. As if I grant a rent newly created out
of my lands in exchange for the mannor of Dale, this is a good ex-
change (4).

[a] 30. E. 1.
Esch. 15.

3. E. 4. 10.

9. E. 4. 21.

14. H. 8. 20.

[b] 6. E. 56.

30. E. 1. Es. 16.

16. E. 3.

Esch. 2.

7. H. 4. 34.

3. E. 4. 11.

[c] 9. E. 4. 21.

9. E. 3. 56.

21. E. 3. 6.

(Post. 366. a.)

(1. Ro. Abr.
212.)

[b] Secondly, there needeth no transmutation of possession, and
therefore a release of a rent, or estovers, or right to land, in exchange
for land, is good (5).

The things [c] exchanged need not be of one nature, so they
concerne lands or tenements, whereof *Littleton* here speaketh. As
land for rent or common, or any other inheritance which concerne
lands or tenements, or spirituall things, as tythes, &c. for tempo-
rall, and tenure by a divine service for a temporall seignory, &c.
But annuities or such like which charge the person onely, and doe
not concerne lands or tenements, cannot be exchanged for lands or
tenements.

Sect. 64, 65.

ET nota, que en eschange il covient,
que les estates soient egales, que am-
bideux tielx parties averont en
les terres issint eschanges; car si l'un
voloit et grant que l'auter averoit la
terre en fee taile pur le terre que il
aeroit del grant de le auter en fee sim-
ple, coment que l'auter soit agree a cel,
cest eschange est voides, pur ceo que les
estates ne sont my egales.

AND note, that in exchanges it
behooveth, that the estates which
both parties have in the lands so
exchanged, be equall; for if the one
willeth and grant that the other shall
have his land in fee taile for the land
which he hath of the grant of the
other in fee simple, although that the
other agree to this, yet this exchange
is voyde, because the estates be not
equall.

EN mesme le manner est, lou il est
grant et agree enter eux, que l'un
avera en l'un terre fee taile, et
l'auter en l'auter terre forsque a terme
de vie; ou si l'un avera en l'un terre
fee taile generall, et l'auter en l'auter
terre fee taile especial, &c. Issint tous
foits il covient que en eschange les estates
d'ambideux parties soient e-al's, c'est
escavoir, si l'un ad fee simple en l'un
terre, que l'auter avera tiel estate en
l'auter terre; et si l'un ad fee taile en
l'un

IN the same manner it is, where it
is granted and agreed betweene
them, that the one shall have in
the one land fee taile, and the other
in the other land but for terme of life;
or if the one shall have in the one
land fee taile generall, and the other
in the other land fee taile especial, &c.
So alwaies it behoveth that in ex-
change the estates of both parties be
equall, viz. if the one hath a fee sim-
ple in the one land, that the other shall
have

(4) [See Note 327.]

(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges.

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 64, 65.

l'un terre, il covient que l'auter avera semblable estate en l'auter terre, &c. et sic de aliis statibus. Mes n'est my riens a charger del egal value des terres; car coment que la terre l'un vault mult plus que la terre de l'auter, ceo n'est riens a purpouse, issint que les estates per l'eschange fait soient egales. Et issint en l'eschange sont deux grants, car chescun partie grant son terre a l'auter en eschange, &c. et en chescun de lour grants mention serra fayt de l'eschange.

have like estate in the other land; and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c. and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a farre greater value then the land of the other, this is nothing to the purpouse, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

Estates.

Vide Sect. 650.

“**E**N eschange il covient que les estates soient egales, &c.” Equality in lands is threefold, viz. First, equality in value: Secondly, equality in quantity of estate given and taken. Thirdly, equality in quality or manner of the estate given and taken. But as *Littleton* after saith, equality in value of lands in exchange is not requisite; neither equality in the quality or manner of the estate. And therefore if two jointenants give lands jointly to two men and their heires, and the other in exchange of other lands to them and their heires in common, this is a good exchange (1); and yet the manner of their estates is not equall, for the estate of one party is joynt, and the other in common. And so it is if two men give lands in exchange to *A.* and his heires for lands from *A.* to them two and their heires, though the one party have a joynt estate, and the other a sole estate, yet the exchange is good. The like is if the one land be of a defeasible title, and the other of an undefeasible title, yet the exchange is good till it be avoyded.

[51. a.]

[a] Bracton, lib. 5. fo. 389.
17. E. 3. 12. b.
4. H. 4. 2.
[b] 14. H. 6.
6. E. 2. Exch. 12.
8. E. 2. Cui in vita 28.
10. E. 2.
Exch. 13.
16. E. 3.
Exch. 2.
3. E. 3. 19.
12. H. 4. 12.
21. H. 6. 25.
13. E. 4. 3. (3)
[d] 44. E. 3. 20.
38. E. 3. 15.
39. E. 3. 1.
9. E. 4. 21.
7. H. 4. 17.
30. E. 1. tit.
Bro. 884. 30. E. 1. tit. Exchange 15.

[a] An exchange with the king is good, and yet the king is seised in his politike capacity, and the subject in his naturall capacity (2). But equality of the quantity of the estate is requisite, as it appeareth clearly in the cases put by *Littleton*. [b] But therein it is to be observed, that it is not necessary that the parties to the exchange be seised of an equall estate at the time of the exchange made: for if tenant in taile, or a husband seised in the right of his wife, exchange lands, and both by the exchange give a fee simple, this is (1. Ro. Abr. 811.) good untill it be avoyded by the issue in tail, or by the wife after the death of the husband; [d] so as *Littleton* saith, that in exchanges it behoveth that the estates which both parties have in the land so exchanged be equal, is as much as to say that the state reciprocally given in exchange ought to be equall. [e] But in a partition the estates allotted to either party need not to be equall, as shall be observed in his proper place.

[51. b.]

To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equall (1).

2. That

[c] F. N. B. 62. m. (Post. 172. b.)

(1) [See Note 328.]

(2) [See Note 329.]

(3) 45. E. 3. 20. Hal. MSS.

[51. b.]

(1) Vid. 22. E. 3. 3. Contra 38. E. 3. 15. Hal. MSS.

2. That this word (*excambium* exchange) be used, [f] which is so individually requisite, as it cannot be supplied by any other word or described by any circumlocution (2): and herewith agreeth *Littleton* afterwards in this Section. In the booke of *Domesday* I finde, *Hanc terram cambiavit Hugo Briccuno quod modò tenet comes Meriton, et ipsum scambium valet duplum.*

Hugo de Belcamp pro scambio de Warres.

3. That there be an execution by entry or claime in the life of the parties, as hath bin said. [g] 4. That if it be of things that lye in grant, it must be by deed. [h] 5. If the lands be in severall counties, there ought to be a deed indented, or if the thing lye in grant, albeit they be in one county.

[i] If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompence) but voidable (3).

[f] 9. E. 4. 21.
25. H. 6. 56.
19. H. 6. 27.
44. E. 3. 24.
50. Ass. Dorset.
Wadon. Bedf.
Sandeia.
9. E. 4. 39.
15. E. 4. 3.
45. E. 3. 30.
45. E. 3.
Exchange 1.
(4. Co. 121.)
[g] 28. H. 6. 2.
[h] 45. E. 3. 20.
7. H. 4. 11.
[i] 4. E. 2. tit.
Exch. 10.
12. H. 4. 12.

“ *Coment que l'auter agree a cel, cest eschange est void.*” The agreement of the parties cannot make that good which the law maketh void.

Sect. 66.

ITEM, si home lessa terre a un autre pur terme d'ans, coment que le lessor morust devant que le lessee enter en les tenements, uncore il poit enter en mesmes les tenements apres le mort le lessor, pur ceo que le lessee per force de le lease ad droit maintenant d'aver les tenements solongue le forme de le lease. Mes si home fait un fait de feoffment a un autre, et un letter d'attorney a un home a deliverer a luy seisin per force de mesme le fait; uncore si liverie de seisin ne soit fait en la vie celui que fesoit le fait, ceo ne vault riens, pur ceo que l'auter n'ad pas ascun droit d'aver les tenements solongue le purport de le dit fait, devant le liverie de seisin; et si nul liverie de seisin soit fait, donque apres le mort celui que fist le fait, le droit de tiels tenements est maintenant en son heire, ou en ascun autre.

ALSO, if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entreth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee by force of the lease hath right presently to have the tenements according to the forme of the lease. But if a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heire, or in some other.

“ **SI** home lessa terre a un autre pur terme d'ans, coment que le lessor morust devant, &c.” The reason is, because the interest of the tearme (as hath beene said) doth passe and vest in the lessee before entry, and therefore the death of the lessor cannot divest that which was vested before.

“ *Attorney*”

(9. Co. 75.
F. N. B. 156.)

"Attorney" is an ancient *English* word, and signifieth one that is set in the turne, stead, or place of another: and of these some be private (whereof our author here speaketh) and some be publike, as attorneys at law, whose warrant from his master is, *ponit loco suo talem attornatum suum*, which setteth in his turne or place such a man to be his attorney.

Vid. Sect. 196.

"Et un letter d'attorney a un home a deliverer a luy seisin per force de mesme le fait." Here first it appeareth that the authority to deliver seisin (as hath bin said) must be by deed (1): for *letter d'attorney* is as much as a warrant of attorney by deed, for *literæ* doe signifie sometime a deed, as *literæ acquietanciæ* doe signifie a deed of acquittance, and herewith [a] agreeth Britton. [52. a.]

[a] 24. E. 3. 27.
11. H. 7. 13.
Britt. 101. b.
[b] 21. E. 4. 18.
Br. feoffments
50. 21. H. 6. 30.
13. E. 3.
Attorney 73.

2. Littleton here speakes generally a un home, and few persons are [b] disabled to be private attorneyes to deliver seisin; for mounks, infants, fem coverts (2), persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneyes. A fem may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in the remainder to the lessee for life.

[c] 12. Aff.
pl. 24.
26. Aff. 39.
11. H. 4. 3.
10. H. 7.
11. H. 7. 13.
40. Aff. 38.
(9. Co. 76. b.)
27. Aff. 61.
41. Aff. 10.
41. E. 3. 17.
(2. Leon. 73.)

3. It appeareth here that the attorney must [c] pursue his warrant, otherwise he doth not deliver seisin by force of the deed, as Littleton speaketh. Now his authority is twofold, expresse in his warrant, and implied in law, both which he must pursue. And first of his expresse authority. A man seised of *Blacke Acre* and *White Acre* makes a deed of feoffment of both, and a letter of attorney to enter into both *Acre*s, and to deliver seisin of both of them according to the forme and effect of the deed, and he entreth into *Blacke Acre* and delivers seisin *secundum formam cartæ*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth seisin of one *secundum formam cartæ*, this is *tantamount* and implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of seisin to both, and the attorney make livery of seisin to one of the feoffees *secundum formam et effectum cartæ*, this is good to both, and yet in that case he that is absent may waive the livery (3). If lessee for life make a deed of feoffment and a letter of attorney to the lessor to make livery, and the lessor maketh livery accordingly, notwithstanding he shall enter for the forfeiture. But if lessee for yeares make a feoffment in fee and a letter of attorney to the lessor to make livery, and he make livery accordingly, this livery shall binde the lessor, and shall not be avoyded by him: for the lessor cannot make livery as attorney to the lessee, because he had no freehold whereof to make livery, but the freehold was in the lessor (4). If the lessor make a deed of feoffment and a letter of attorney to the lessee for yeares to make livery, and he doth it accordingly, this shall not drowne or extinguish his tearme, because he did it as a minister to another (6) and in another's right, and is accounted in judgement of law the act of the other, and the feoffee claimeth nothing by him (7).

Tr. 7. Eliz. in
com. banco (5).
(Mo. 11. Cro.
Ja. 177.)

17. E. 3. 61.
(F. N. B. 35. O.)

If one as procurator or attorney to another present to his owne benefice, he puts himselfe out of possession, because he commeth in by the

(1) Vid. 1. Aff. 16. 26. Aff. 29.
35. Aff. 1. 12. H. 7. 27. 13. H. 7. 14.
4. H. 7. 13. 13. E. 4. 8. Hal. MSS.
(2) [See Note 332.]
(3) [See Note 333.]

(4) [See Note 334.]
(5) *Smith's case*. Hal. MSS.
(6) [See Note 335.]
(7) [See Note 336.]

the induction and institution of the ordinary. If the tenant devise that the lord shall sell the land, and dieth, and the lord selleth it, the feigniorie remaines. But if the lord or a grantee of a rent charge had been also *cestuy que use* of the land, and after the statute of R. 3. and before the statute of 27 H. 8. *cestuy que use* had made a feoffment in fee of the land, albeit the land passeth from the feoffees, and his feoffment is warranted by the power given to him by the statute, yet the feigniorie or rent charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (8).

(1. Co. 111.
Post. 265. b.)

2. If a man be disseised of *Blacke Acre* and *White Acre*, and a warrant of attorney is made to enter into both and to make livery, there if the attorney enter into *Blacke Acre* onely and makes livery *secundum formam carte*, there the livery of seisin is void, because he doth lesse then his warrant (9); for the estate of the disseisor in *White Acre* cannot be devested without an entry. But there is a diversity betweene an authority coupled with an interest, and a bare authority (1). For example, a custome within a mannor time out of mind of man used, was to grant certaine lands parcell of the said mannor in fee simple, and never any grant was made to any, and the heires of his body, for life or for yeares; and the lord of the said mannor did grant to one by copie for life, the remainder over to another, and the heires of his body; and it was [k] adjudged, that the grant and remainder over was good; for the lord having authoritie by custome, and an interest withall, might grant any lesser estate: for in this case, the custome that enableth him to the greater, enableth him to the lesser, *Omne majus in se continet minus*. But he that hath but a bare authority, as he that hath a warrant of attorney, must pursue his authority (as hath beene said); and if he doe lesse, it is voyd (2).

(Post. 252. b.)

3. A man make a lease for life, and after make a charter of feoffment, with a letter of attorney to deliver seisin, the attorney enters upon the lessee, this is sufficient to convey away the reversion; for (3) (that it may be said once for all) livery of seisin being to perfect the common assurance of lands, is alwayes expounded favorably, *ut res magis valeat quam pereat*. And all this was adjudged and [l] resolved by the court of common pleas, and after affirmed by all the judges of the king's bench, in a writ of error.

(1. Ro. Abr. 511.)
[k] Hil. 36. El. Rot. 492. inter Stanton & Barnes, in ejectione firmæ, in the King's Bench.
(Post. 265. b. 1. Sid. 6.)

And it is to be knowne, that a deed of feoffment beginning *Omni-bus Christi fidelibus*, &c. or *Sciatis presentes et futuri*, &c. or the like, a letter of attorney may be contained in such a deed; for one continent may containe divers deeds to severall persons; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part, * there a letter of attorney in such a deed is not good, unlesse the attorney be made a party in the deed indented (4).

2. & 3. Ph. & M. Dyer 131.
17. El. Dyer 40.
(Mo. 91. 2. Sid. 65. 2. Leon. 19. Ante 48. b.)
[l] Pasc. 31. El. Rot. 514. in Com. Banc. inter Carter pl. & Claypole & al. def. In ejectione firmæ, & in brieve de error. Hil. 32. El. Rot. 791.
* Communis error fecit jus (ut dicitur) in contrarium.
(2. Inst. 673.
2. Ro. Abr. 8. Cro. Eliz. 905.)
Pasc. 3. El. in Com. Banc. in Yarham's case.

Now the authoritie of an attorney implied in the law, is, though the warrant be generall, to deliver seisin; yet the attorney cannot deliver seisin within the view, for his warrant is intendable in law of an actuall and expresse livery and not of a livery in law, and so hath it been resolved (5). See more hereof here next following.

"Uncore

(8) See *supra* note 7.

(9) [See Note 337.]

[52. b.]

(1) See ante 49. b. and post. 115. a. and 181. b.

(2) [See Note 338.]

(3) [See Note 339.]

(4) *Adjudged contra between Dicker and Noland.* Hal. MSS.—See also another case *contra* in Cro. Eliz. 905. The case cited by lord Hale is in 2. Ro. Abr. 8. pl. 12.

(5) *Dy. 223. Sir Walter Denny's case.* Hal. MSS.

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 67.

22. H. 6. 6.

“ *Uncore si liverie et seisin ne soit fait en la vie celui que fesoit le fait.*” Here albeit the warrant of attorney be indefinite, without limitation of any time, yet the law prescribeth a time, as *Littleton* here saith, in the life of him that made the deed; but the death not only of the feoffor, of whom *Littleton* speaketh, but of the feoffee also, is a countermand in law of the letter of attorney, and the deed it selfe is become of none effect, because in this case nothing doth passe before livery of seisin. For if the feoffor dieth, the land descends to his heire, and if the feoffee dieth, liverie cannot be made to his heire, because then he should take by purchase, where heires were named by way of limitation (6). And herewith agreeth *Bracton*, *Item oportet quod donationem sequatur rei traditio, etiam in vita donatoris et donatorij.* Therefore a letter of attorney to deliver livery of seisin after the decease of the feoffor is voyd (7).

Bracton, li. 2. fo. 16.

40. Aff. pl. 38.

29. H. 6. 7. a.

14. E. 4. 2.

18. E. 3. 16. b.

11. H. 7. 13, &c.

18. H. 8. 3.

11. H. 7. 19.

(1. Sid. 162.)

Fourthly, in all cases the attorney must pursue the warrant in substance and effect that he hath to deliver seisin.

Fifthly, all this is to be understood of sole persons, or of a corporation or body consisting of one sole person, or a bishop, parson, &c. But it holdeth not in a corporation aggregate of many persons capable (8). And therefore if a maior and commonalty make a charter of feoffement, and a letter of attorney to deliver seisin, the livery of seisin is good after the decease of the maior, because the corporation never dieth (9). The like of a deane and chapter, *et sic de similibus.*

(4. Co. 119. b.

Cro. Ja. 103.

6. Co. 38.)

Mich. 3. Ja. in Com. Banc.

F. N. B. 223.

2. E. 3. offi. de

Court. 29.

Stamf. Prær. 30.

(1. Ro. Abr.

331, 332.)

Lastly, if the lessor by his deed license the lessee for life or yeares (which is restrained by condition not to alien without licence) to alien, and the lessor dieth before the lessee doth alien, yet is his death no countermand of the licence, but that he may alien, for the licence exempteth the lessee out of the penaltie of the condition, and it was executed on the part of the lessor as much as might be. And so it was resolved, *Michael. 3. Jacob. in Communi Banco.* As if the king doth license to alien in mortmaine, and dyeth, the licence may be executed after (10).

Sect. 67.

ITEM, si tenements soient lesses a un home pur terme de demy an, ou pur le quarter de un an, &c. en tiel case, si le lessee fait wast, le lessor avera envers luy brieve de wast, et le brieve dirra, quod tenet ad terminum annorum; mes il avera un speciall declaration sur le veritie de son matter, et le count n'abaterra le brieve, pur ceo que il puit aver nul auter brieve sur le matter.

AL S O, if tenements be let to a man for terme of halfe a yeare, or for a quarter of a yeare, &c. in this case, if the lessee commit wast, the lessor shall have a writ of waste against him, and the writ shall say, quod tenet ad terminum annorum; but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

“ SI

(6) [See Note 340.]

(7) [See Note 341.]

(8) 11. H. 7. 27. 12. H. 8. 12. 5. H. 7. 25. 21. H. 7. 1. Hal. MSS.

(9) [See Note 342.]

(10) Vid. *Plowd. Com.* 457. contra in licen^e to the tenant to alien, ut videatur. Hal. MSS.

"*SI le lessee fait wast.*" Waste, *Vastum, dicitur à vastando*, of (F. N. B. Waste 55. Post. 355.)
 [53. a.] wasting and depopulating: and for that wast is often alledged to be in timber, which we call in *Latine maremium*, or *maref-nium*, or *maresmium*, it is good to fetch both of them from the original. First, *timber* is a *Saxon* word. Secondly, *maremium* is derived of the *French* word *marreim*, or *marrein*, which properly signifieth timber.

An action of wast doth lie against tenant by the curtesie, tenant in dower, tenant for life, for yeares, or halfe a yeare, or gardian, in chivalry (1), by him that hath the immediate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands (2), meadows, &c. or in exile of men to the disherison of him in the reversion or remainder. There be two kinds of waste, viz. voluntary or actually, and permissive. [a] Wast may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten (3). [b] But if the house be uncovered when the tenant commeth in, it is no wast in the tenant to suffer the same to fall downe. But though the house be ruinous at the tenant's coming in, yet if he pull it downe, it is wast unlesse he reedifie it againe (4). [c] Also if glasse windowes (tho' glazed by the tenant himselfe) be broken downe, or carried away, it is wast, for the glasse is part of his house. And so it is of wainscot (5), benches, doores, windowes, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

[c] 22. H. 6. 18. 12. H. 8. 1. 13. H. 7. 21. 22. E. 4. 18. 21. E. 4. 39. 10. H. 7. 2. Reg. Judic. 26.

[d] Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer waste to be done in houses, yet if he repaire them before any action brought, there lieth no action of wast against him, but he cannot plead, *quod non fecit vastum*, but the speciall matter.

A wall uncovered when the tenant commeth in, is no wast if it be suffered to decay. [e] If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste (6).

[f] If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste. [g] If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall downe, the tenant may build the same againe with such materials as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger then it was. If the house be discovered by tempest, the tenant must in convenient time repaire it (7).

Herlakenden's case. 43. E. 3. 6. 26. E. 3. 76. 11. H. 4. 32. 12. H. 4. 5. 22. H. 6. 18. 19. E. 3. Wast. 30.

[b] If the tenant of a dove house, warren, parke, vivary, estanges, or the like, do take so many, as such sufficient store be not left as

Wast. 97. 12. H. 8. 1. Pl. Com. 322. 7. H. 3. Wast. 141. (2. Ro. Abr. 814.)

(1) Some of these were not punishable at common law. See post. 53. b. and 54. a.

(2) [See Note 343.]

(3) [See Note 344.]

(4) [See Note 345.]

(5) [See Note 346.]

(6) 14. H. 4. 12. Hal. MSS.

(7) [See Note 347.]

as he found when he came in, this is waft; and to suffer the pale to decay, whereby the deere is disperfed, is waste (8).

[i] 22. H. 6.
12. a.
9. H. 6. 1. 66.
11. H. 6. 1.
F. N. B. 59. m.
[k] 20. E. 3.
Waft. 32.
10. H. 7. 2.
42. E. 3. 6. b.
5. E. 4. 100.
41. E. 3.
Waft. 82.
20. E. 3.
Waft. 32.
12. E. 4. 1. (9)

And it is to be observed, that there is waft, destruction and exile. Waft properly is in houfes, gardens, (as is aforefaid) in timber trees, (viz. oak, afh, and elme, and thefe be timber trees in all places) either by cutting of them downe, or topping of them, or doing any act whereby the timber may decay. Also in countries where timber is fcarce, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. [i] If the tenant cut down timber trees, or fuch as are accounted timber (10), as is aforefaid, this is waft; and if he suffer the young germins to be destroyed, this is destruction. [k] So it is, if the tenant cut down underwood, (as he may by law) yet if he suffer the young germins to be destroyed, or if he stub up the fame, this is destruction.

[l] 40. E. 3.
15. b. & 35.
12. E. 4. 1.
12. H. 8. 1. b.
10. H. 7. 2.
8. E. 2.
Waft. 111.
4. E. 6.
Waft. Br. 136.
(Cro. Ja. 126.
4. Co. 63, 64.
1. Ro. Ab. 569.)
20. E. 3. Waft. 32.

[l] Cutting down of willowes, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction. [m] If there be a quickset fence of white thorne, if the tenant stub it up, or suffer it to be destroyed, this is destruction (11); and for all these and the like destructions an action of waft lyeth. [n] The cutting of dead wood, that is, *ubi arbores sunt aridæ, mortuæ, cavæ, non exiftentes maremium, nec portantes fructus, nec folia in æstate*, is no waft; but turning of trees to coles for fewell, when there is sufficient dead wood, is waft.

[53. b.]

[m] 46. E. 3. 17. 9. H. 6. 10. 12. H. 8. 1. [n] 16. El. Dy. 332.
20. E. 3. Waft. 32. F. N. B. 59. m.

[o] 44. E. 3. 44.
20. E. 3.
Waft. 32.
F. N. B. 59. b.
19. E. 3.
Waft. 30.
[p] 22. H. 6.
18. b.
9. E. 4. 35.
41. E. 3. Waft. 82.
Waft. 32. (2. Ro. Ab. 815, 816.)

[o] If the tenant suffer the houfes to be wasted, and then fell down timber to repaire the fame, this is a double waft. [p] Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is waft; but the tenant may dig for gravell or clay for the reparation of the house, as well as he may take convenient timber trees (1).

[q] Anno 6. El.
Of the report of
justice Dalison
in Griffin's case.
17. E. 3. 65.
Brit. fol. 168. b.
(Mo. 62. 69.)
[r] 20. H. 6. 1.
F. N. B. 59. n.
6. El. ubi supra.
[s] 28. H. 8.
Dyer 37.
22. H. 6. 24.
10. H. 5. a.
44. E. 3. 44.
(2. Ro. Ab. 814.
Cro. Ja. 182.)

[q] It is waft to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by winde, tempest, or the like, without any default in the tenant, [r] this is no waft punishable (2). So it is, if the tenant repaire not the bankes or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable (3).

[s] If the tenant convert arable land into wood, or *à converso*, or meadow into arable, it is waste, for it changeth not onely the course of his husbandry, but the prooffe of his evidence.

[t] The tenant may take sufficient wood to repaire the walls, pales, [53. b.]
[t] 16. El. Dy. 332. 21. H. 6. 41. 5. E. 4. 100. 12. E. 3. Waft. 28. 48. E. 3. 25. Temps
E. 1. 123. 20. E. 3. Waft. 32. 19. E. 3. Waft. 30. (Cro. Ja. 292.)

(8) [See Note 348.]

(9) 7. H. 6. 38. Dy. 35. Hal. MSS.

(10) [See Note 349.]

(11) [See Note 350.]

[53. b.]

(1) [See Note 351.]

(2) See Call. on Sew. 2d ed. 146.

(3) [See Note 352.]

pales, fences, hedges, and ditches, as he found them; but he can make no new (4): and he may take also sufficient plowbote, firebote, and other housbote.

The tenant cutteth downe trees for reparations and selleth them, and after buyeth them againe, and imployes them about necessary reparations, yet it is wast by the vendition: he cannot sell trees, and with the money cover the house: burning of the house by negligence or mischance is waste (5).

[u] If a man make a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of waste shall lye, for the place wasted cannot be recovered without a plea.

[x] *Bracton, Fleta, and Britton* doe use the same division as is aforesaid, viz. *vastum, destructio, et exilium*, in their proper signification.

Now somewhat is to be spoken of exile or destruction of men: exile or destruction of villaines, or tenants at will, or making them poore, where they were rich when the tenant came in, whereby they depart from their tenures, is wast. [a] And yet the statute of *Glouc'* speaketh not of exile, but it is comprehended under the general word of wast. The statute of *W. 1.* hath *destructio*, the statute of *Magna Charta* hath *vastum et destructio*, the statute of *Merlebridge* hath *vastum, venditionem et exilium in domibus, boscis, vel hominibus, &c.*

But wast and destruction in their larger sense are words convertible. [b] *Item de hoc quod dicit vastum et exilium, sciendum est quod non sunt referenda ad eundem intellectum, sed vastum et destructio ferè idem sunt, vastum idem est quod destructio, et è converso, et se habent ad omnem destructionem generaliter,*

[c] *Vastum autem et destructio ferè æquipollent et convertibiliter se habent in domibus, boscis, et gardinis; sed exilium dici poterit, cum servi manumittantur et à tenementis suis injuriose ejiciantur. Fortuna autem et ignis vel hujusmodi eventus inopinati omnes tenentes excusant.*

[d] No person shall have an action of waste, unlesse he hath the immediate state of inheritance, but sometime another shall joyne with him for conformity. As if a reversion be granted to two, and to the heires of one; they two shall joyne in an action of waste: and in like sort the surviving coparcener and the tenant by the curtesie shall joyne in an action of waste: and if two joyntenants be, and to the heires of one of them, and they make a lease for life, they shall joyne in an action of waste (7) [e] If the estate tail determine, hanging the action of waste, and the plt. becomes tenant in taile after possibility, the action of waste is gone. [f] If the tenant doth waste, and he in the reversion dyeth, the heyre shall not have an action of waste for the waste done in the life of the ancestor; nor a bishop, master of an hospitall, parson, or the like, in the time of the predecessor. [g] And

[u] 3. E. 3.
Wast. 5.
Bracton, lib. 4.
fol. 315.

[x] Bracton,
fol. 168. Fleta,
lib. 1. cap. 11.
16. H. 3.
Wast. 135.
3. E. 3. tit.
Wast. 2.
17. E. 2.
Wast. 118.
10. H. 7.
2. H. 6. 11.
9. H. 6. 52.
11. E. 2.
Wast. 113.
F. N. B. 56. H.
& 55. c.
Regist. judic. 25.
[a] Glouc. cap.
5. W. 1. cap. 21.
Magna Charta,
cap. 4. Merleb.
cap. 23.
[b] Bract. lib. 4.
fol. 316 & 317.
[c] Fleta, lib. 1.
cap. 11.
[d] 7. E. 3.
54. b.
2. H. 5. 7.
22. H. 6. 24.
13. H. 7.
27. H. 8. 13.
F. N. B. 59 f.
8. R. 2.
Wast. 147. (6)
(5. Co. 11.)
[e] 2. H. 4. 22.
[f] 2. H. 4. 2.
(8)

[g] 10. E. 4. 1.
49. E. 3. 25.
23. H. 8. tit.
Wast. 115.

Wast. Br. 38. E. 3. 17. 44. E. 3. 8. 45. E. 3. 3. 46. E. 3. 31. 11. E. 2. Wast. 115.
2. Mar. Wast. 117. 8. E. 2. Wast. 110. (9) (Ant. 42. a.)

(4) [See Note 353.]

(5) But now by the 6. Ann. c. 31. no action will lie against the tenant for such an accident. See the statute more fully stated in note 7. ante 53. a. Note also the passage from *Fleta* cited infra by lord Coke.

(6) 17. E. 3. 50. Hal. MSS.

(7) [See Note 354.]

(8) 21. H. 6. 46. 39. E. 3. 15. 42. E. 3. 22. Hal. MSS.

(9) 18. E. 4. 16. 10. H. 7. 5. 2. E. 3. 2. Hal. MSS.

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so if lessee for yeares doth waste, and dyeth, an action of waste lyeth not against the executor or administrator for waste done before their time. But if two coparceners be of a reversion, and waste is committed, and the one of them die, the aunt and the neece shall joine in an action of waste (10).

[b] 24. E. 3. 27. [b] If lands be given to two and the heires of one of them, he that hath the fee shall not have an action of waste upon the statute of *Glouc.* for that they are joyntenants, but his heire shall have an action of waste against tenant for life.

50. E. 3. 3.
8. H. 6. 13.
(Post. 247. b.
5. Co. 75.
2. Ro. Ab. 834.
Post. 218. b.)

Note, after waste done there is a speciall regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste he granteth it over, though he taketh backe the whole estate again, yet is the waste dispunishable. So if he grant the reversion to the use of himselfe and his wife, and of his heires, yet the waste is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone.

[i] A prohibition of waste did lye against tenant by the curtesie (11), tenant in dower, and a gardian in chivalry, by the common law, but not against tenant for life or yeares, because they came in by their own act, and he might have provided that no waste should be done.

[i] Bract. lib. 4.
fol. 315, 316,
317. Fleta, lib. 1.
cap. 11. Brit.
fol. 168.
Doct. & Stud.

lib. 2. ca. 1. 12. H. 4. 3. 10. H. 3. Waste. 142. 20. H. 6. 1. 4. H. 3. Waste. 140.
9. H. 3. ibid. 136. (10. Co. 116. b.) (2. Inst. 145. Post. 273. 299. b. 5. Co. 77. Stat.
Glouc. c. 5.)

[54. a.]

[i] F. N. B. 56. [i] A tenant by the curtesie or in dower can hold of none but of the heire, and his heires by descent, and therefore if they grant over their whole estate, and the grantee doth waste, yet the heire shall have an action of waste against them, and recover the land against the assignee: but if the heire either before the assignement had granted, or after the assignement doth grant the reversion over, the stranger shall have an action of waste against the assignee, because in both cases the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste (for it is in nature of a trespassse) unlessse it be in the case of a ward [k]; for there if the gardian doth waste and assigne over, the action lieth against the assignee [l]. A gardian shall not be punished for waste done by a stranger, it is so penall unto him, for he shall lose the wardship both of the body and of the land (3), though the waste be but to the value of twenty shillings; and if that sufficeth not to satisfie for the waste, then he shall recover damages of the waste, over and above the losse of the ward. But tenant by the curtesie, tenant in dower, tenant for life, yeares, &c. shall answer for the waste done by a stranger, and shall take their remedy over. [m] But if there be two joyntenants of a ward, and one of them doe waste, both shall answer for it.

[i] F. N. B. 56.
e. et f. Temps
E. 1. Waste. 122.
18. E. 3. 3.
30. E. 3. 16.
38. E. 3. 23.
11. H. 4. 18.
4. E. 3. 25.
Regist. 72.
3. Co. 23.
Walker's case.
9. Co. 142.
Beaumont's
case (1).
(2. Inst. 303.
Dr. & Stud.
lib. 2. c. 1.)
[k] 27. E. 3. 81.
26. E. 3.
Waste. 10. (2)
[l] 12. H. 4. 3.
Bract. lib. 4.
316, 317.
Fleta, lib. 1.
c. 11 Brit. 168.
34 E. 3.
Waste. 146.
44. E. 3. 27.
F. N. B. 59. a. & 60. g. & T.

[m] 33. E. 3. Waste. 6. (4)

If

(10) [See Note 355.]
(11) [See Note 356.]

(2) 26. E. 3. Waste 10. is contra. Hal. MSS.

(3) Value of wardship not lost. Vid. Dy. 35. 28. H. 8. Bendl. n. 33 Hal. MSS.

(4) 3. E. 3. 18. Hal. MSS.

[54. a.]

(1) 7. E. 3. 34. Hal. MSS.

[n] If the gardian doth waste, and the heire within age bring an action of waste, the gardian shall lose the wardship, as is aforesaid; but if the heire bring an action of waste at his full age, then he shall recover treble damages, for then he cannot lose the wardship.

Wast. 117. 41. E. 3. Wast. 81. 3. E. 2. Wast. 3.

[n] 44. E. 3. 27.
48. E. 3. 10.
F. N. B. 60. t.
12. H. 4. 3.
19. E. 2.
7. E. 3. 12.

[o] An infant and baron and fem shall be punished for waste done by a stranger; and so shall the wife that hath the state by survivour for wast done by the husband in his life time, if she agree to the estate, though there hath beene variety of opinions in our bookes.

11. Aff. 11. 21. H. 6. 24. b. 33. H. 6. 31. a. 42. E. 3. 22. 19. E. 3. breve 246. 46. E. 3. 25.
7. H. 6. 2. b. 3. E. 3. 46. 10. E. 3. 17, 18. 9. E. 3. 42. 9. E. 3. breve 246. 17. E. 4. 7.
9. H. 6. 52. F. N. B. 36. b. Doct. & Stud. lib. 2. c. 1. 23. H. 8. Wast. 138. 8. Co. 44.
Willingham's case.

[o] 15 H. 3.
Wast. 16. temps
E. 1. Wast. 128.
2. H. 4. 3. a.
3. E. 3. 13 76.

[p] But if a fem tenant for life take husband, and the husband doth waste, and the wife dieth, no action of wast lyeth against the husband in the *tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold; but if a fem be possessed of a terme for yeares, and take husband, and the husband doth wast, and the wife dieth, the husband shall be charged in an action of waste, for the law giveth the terme to him.

[p] 5. Co. 75.
Clinton's case.
49. E. 3. 25.
46. E. 3. Wast.
Statham.
10. H. 6. 11, 12.
(2. Inst. 301.)

[q] If tenant for life grant over his estate upon condition, and the grantee doth wast, and the grantor re-enteth for the condition broken, the action of wast shall be brought against the grantee, and the place wasted recovered.

[q] 30. E. 3. 16.

[r] If a lease for life be made to a villeine, and waste is done, the lord enteth, he shall not be punished for the waste done before, but for waste done after, he shall.

[r] 48. E. 3. 19.

[s] An occupant shall be punished for waste; and so if an estate be made to *A.* and his heires during the life of *B.* *A.* dieth, the heire of *A.* shall be punished in an action of waste,

[s] 6. Co. 27.
le Deane &
Chapter of
Worcester's case.
10. Co. 9. b. (2. Ro. Abr. 826.)

[t] If a lease be made to *A.* for life, the remainder to *B.* for life, the remainder to *C.* in fee, in this case where it is said in the *Register*, and in *F. N. B.* that an action of wast doth lie, it is to be understood after the death or surrender of *B.* in the meane remainder, for during his life no action of waste doth lie (5).

[t] 4. E. 3. 18.
Cote's case.
3. E. 3. 18.
F. N. B. 58. c.
& 59 h.
50. E. 3. 3.
33. E. 3.
Wast. 144.
11. E. 3.
resceit 118.

But if a lease for life be made, the remainder for yeares, the remainder in fee, an action doth lie presently during the terme in remainder, for the meane terme for yeares is no impediment.

But if a man make a lease for life or yeares, and after granteth the reversion for yeares, the lessor shall have no action of waste during the yeares, for he himself hath granted away the reversion, in respect whereof he is to maintaine his action. [*] Otherwise it is, if he had made a lease in reversion, which had been but a future interest; for there an action of wast lieth during the terme, and so is the booke to be understood, and the terme shall be saved in that case.

10. E. 4. 9.
Regist. 74.
2. Co. 92. inter
Paget and Carie
in Bingham's
case. 5. Co. 76.
Paget's case.
10. Co. 44.
Jenning's case.
F. N. B. 59. h.
tit. Wast. 18.

4. E. 3. 18.

[*] 4. E. 3. 18. F.

[u] No action of wast lieth against a gardian in socage, but an account or trespassse, nor against tenant by statute staple, &c. or *elagit* (6).

[u] Merlebridge
cap. 17.
21. E. 3. 30.
16. E. 3. tit.
Wast. 100.

14. E. 3. Wast. 107. 2. E. 2. Wast. 1. 28. H. 6. Wast. 9. 32. H. 6. 7. F. N. B. 59. E.

(5) [See Note 357.]

(6) Vid. F. N. B. 58. *Grantee of reversion shall have waste.* Hal. MSS,

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[w] 11. H. 6. cap. 5.

5. Co. 77. Boothe's case.

[x] 8. E. 3. Wast. 112.

4. E. 6.

Wast. 136.

4. E. 3. 32.

15. H. 7. 11.

15. E. 3.

Wast. 134.

temps E. 1.

Wast. 134.

18. H. 8. 1. (8)

[y] Bract. lib. 4.

fo. 316.

38. E. 3. 7. b.

34. E. 3.

Wast. 146.

14. H. 4. 11. b.

F. N. B. 60. c.

temps E. 1.

Wast. 124.

19. H. 6. 8. (11)

[w] If tenant for life or yeares or their assignee make a grant over, and notwithstanding take the profits, an action of wast lieth against him, by him in the reversion or remainder by the statute. *Nota* (7).

[x] If wast be done *sparsim* here and there in woods, the whole woods shall be recovered, or so much wherein the wast *sparsim* is done. And so in houses so many rooms shall be recovered wherein there is wast done; but if wast be done *sparsim* throughout, all shall be recovered. It hath beene said that if the hall be wasted, the whole house shall be recovered, because the whole house is denominated of the hall: but later authority is to the contrary.

[y] There is waste of a small value, as *Bracton* saith, *Nisi vastum ita modicum sit propter quod non fit inquisitio facienda*. Yet trees to the value of three shillings and foure pence hath beene adjudged wast, and many things together may make waste to a value (9). But let us now returne to our author (10).

“*Briefe de waste.*” See in the *Register* five severall writs of wast; two at the common law for wast done by tenant in dower, or the gardian; and three by speciall or statute law, for waste done by tenant for life, for yeares, and tenant by the curtesie.

[z] Vid. Bract.

lib. 5. f. 413. b.

Fleta, lib. 2.

cap. 12.

See the Second

Part of the

Institutes.

W. 2. cap. 24.

De vasto, Bract.

li. 4. f. 315, 316,

317. Fleta, li. 1.

c. 11. & li. 5.

c. 33. Britton,

fol. 162. & 168.

46. E. 3. 31.

F. N. B. 60. c.

4. E. 4. 13.

37. H. 6. 26. b.

7. H. 7. 2.

14. H. 8. 12.

18. E. 3. 27.

(Dr. & Stud.

li. 1. cap. 23.)

Vide Marle-

bridge, ca. 23.

2. Part of the

Institutes.

“*Briefe dirra.*” The writs originall of the *Register* [z] (as *Bracton* saith) were formed, and of course had their first authority by act of parliament; and therefore without an act of parliament they cannot be altered, or changed, which is proved by the statute of W. 2. cap. 24. whereby remedy is provided in many cases. But heare what *Bracton* saith. *Sunt quedam brevia formata in suis casibus, et quedam de cursu, quæ concilio totius regni sunt approbata, quæ quidem mutari non possunt, absque eorundem contrariâ voluntate. Magistralia autem sæpè variantur secundum varietatem casuum, &c.* And this is the reason that in this case of halfe a yeare the words of the writ shall be without change, *quod tenet ad terminum annorum*, and the pl^a must make a speciall declaration according to his case, for otherwise he should be without remedy. In this particular case the statute of *Glouc.* cap. 5. which giveth the action of waste against the lessee for life or yeares (which lay not against them at the common law) speaketh of one that holdeth for tearme of yeares in the plural number; and yet here it appeareth by the authority of *Littleton*, that although it be a penall law, whereby treble damages and the place wasted shall be recovered, yet a tenant for halfe a yeare being within the same mischiefe, shall be within the same remedie, though it be out of the letter of the law; for *Qui hæret in literâ, hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certaine judgment. You may observe in the said ancient authors, what remedie was given for wast at the common law, and against whom, and what was adjudged waste, destruction, and exile.

In many cases a tenant for life or yeares may fell down timber to make reparations, albeit he be not compellable thereunto, and shall not be punished for the same in any action of waste. As [a] if a house be ruinous at the time of the lease made, if the lessee suffer the house

[54. b.]

[a] 12. H. 8. 1.

(11. Co. 47. 79.

b. Mo. 23.)

(7) F. N. B. 59. C. Hal. MSS.

(8) 3. E. 3. 24. Hal. MSS.

(9) Vid. Hil. 40. Eliz. C. B. n. 9.

Thorne's case. C. C. Waste to the value of

4d. Hal. MSS.

(10) [See Note 358.]

(11) 9. H. 6. 66. Hal. MSS.

house to fall down he is not punishable, for he is not bound by law to repair the house in that case. And yet if he cut down timber upon the ground so letten, and repaire it, he may well justifie it; and the reason is, for that the law doth favour the suppartation or maintenance of houses of habitation for mankind. And therefore if two or more joyntenants or tenants in common be of a house of habitation, and the one will not repaire the house, the other shall have by the law a writ of *de reparatione faciendâ*, and the writ saith, *ad sustentationem ejusdem domûs teneantur*. So it is if the lessor by his covenant undertaketh to repaire the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto (1). In the same manner, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repaire the house, though he may utterly waste it if he will; and so in many other cases. A man hath land in which there is a mine of coales, or of the like, and maketh [b] a lease of the land (without mentioning any mines) for life or for yeares, the lessee for such mines as were open at the time of the lease made, may digge and take the profits thereof. [c] But he cannot digge for any new mine, that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines onely, and not to any hidden mine (2): but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may digge for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be knowne of all men (3).

F. N. B. fo. 127.

(Hob. 234.)

[b] 17. E. 3. 7.
9. H. 6. 66.
12. H. 6. 18.
9. E. 4. 35.
12. E. 4. 8.
F. N. B. 149.
c. & 59. n.
[c] 5. Co. 12.
Sander's case.
(1. Co. 46.)

Now hath *Littleton* spoken of an estate for life, and an estate for yeares in severall persons. Now let us see how they stand *simul* and *semel* in one person.

If a man letteth lands to another for life, the remainder to him for 21 yeares, he hath both estates in him so distinctly, as he may grant away either of them; for a greater estate may uphold a lesser, but not *à converſo*; and therefore if a man make a lease to one for 21 yeares, the remainder to him for terme of his life, the lease for yeares is drowned.

[d] If a man make a lease for life to one, the remainder to his executors for 21 yeares, the terme for yeares shall vest in him (4); for even as ancestor and heire are *correlativa* as to inheritance; (as if an estate for life be made to *A.* the remainder to *B.* in taile, the remainder to the right heires of *A.* the fee vesteth in *A.* as it had been limited to him and his heires); even so are the testators and the executors *correlativa* as to any chattell. And therefore if a lease for life be made to the testator, the remainder to his executors for yeares, the chattell shall vest in the lessee himsele, as well as if it had been limited to him and his executors.

[d] 19. E. 2.
Covenant 25.
19. E. 3.
Covenant 24.
32. E. 3.
Quid juris cl. 5.
17. E. 3. 29.
46. E. 3. 31.
40. E. 3. 5.
11. H. 4. 34.
14. Eliz.
Dyer 309.
M. 40. & 41.

Eliz. in Com. Banc. Rot. 2215. in tresp. inter Sparke & Sparke. Hill. 42. Eliz. Sir John Savage's case in Curiâ Wardorum. (2. Ro. Abr. 47. 418. Mo. 100. 339. 666. 2. Leon. 6. Yelv. 85.)

(1) [See Note 359.]

(2) See ante 53. b. and n. 1. there.

(3) See further as to *waste* in the several Abridgments, title *Waste*, and Fulb. 2. part, Paral. Dial. 5. fol. 49. b.

(4) 50. Aff. 1. And per curiam in Sparkes's

case adjudged, that it shall go to the administrator. Vide tamen M. 44. 45. Eliz. Moore's Reports, n. 911. contra. Vid. 4. & 5. P. and M. Bendl. n. 115. Gravener's case. Hal. MSS.

TENANT a volunt est, ou terres ou tenements sont lessés per un home a un autre, a aver et tener a luy a la volunt le lessor, per force de quel lease le lessée est en possession. En tiel cas le lessée est appel tenant a volunt, pur ceo que il n'ad ascun certaine ne sure estate, car le lessor luy poit ouster a quel temps que il luy plerroit. Uncore si le lessée emblea la terre, et le lessor, apres l'embleer et devant que les blees sont matures, luy ousta, uncore le lessée avera les blees, et avera frank entre egres et regres a scier et de carier les blees, pur ceo que il ne scavoit a quel temps le lessor voloit entre sur luy. Auterment est si tenant pur terme d'ans que conust le fine de son terme emblea sa terre, et le terme est finy devant que les blees sont matures. En ceo cas le lessor, ou celuy en la reversion avera les blees, pur ceo que le termor conust le certaintie de sa terme quant sa terme ferroit finy.

TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for yeares, which knoweth the end of his terme, doth sow the land, and his terme endeth before the corn is ripe. In this case the lessor, or he in the reversion shall have the corne, because the lessee knew the certainty of his terme and when it would end.

Fleta, lib. 3.
cap. 15.

(1. Ro. Abr. 858.)
18. H. 6. 1.
38. H. 6. 21.
9. E. 4. 1. b.
10. E. 4. 18. b.
21. H. 7. 38.
13. H. 8. 16.
14. H. 8. 11. 14.
(2)

Fleta, lib. 3.
cap. 15.

TENANT a volunt est, ou terres ou tenements sont lessés per un home a un autre, a aver et tener a luy a la volunt le lessor, &c."

(1) It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes that seeme *primâ facie* to differ, clearly reconciled (3).

" Pur ceo que il n'ad ascun certaine ou sure estate, &c." *Alia possessio est præcaria, et alia pro prece concessa, ut si quis sine scripto concesserit alicui habitationem vel usufructum in re sua tenenda ad voluntatem suam, hæc quidem possessio præcaria est et nuda, eò quòd tempestivè et intempestivè pro voluntate domini poterit revocari.*

" Uncore

(1) [See Note 360.]

(2) 49. H. 6. 18. 20. E. 4. 9. Hal. MSS.

(3) [See Note 361.]

“*Uncore si le leffee emblea la terre, et le lessor apres le embleer, &c.*” (4) (5 Co. 85. a. 1. Sid. 339.)
 The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground (5) should be unmanured, which should be hurtfull to the commonwealth, he shall reape the crop which he sowed in peace, albeit the lessor doth determine his wil before it be ripe. And so it is, if he set rootes, or sow hempe or flax, or any other annual profit, if (1) after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or yong oaks, ashes, elmes, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yeeld no present annuall profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corne sowne, &c. but to every particular tenant that hath an estate incertaine, for that is the reason which *Littleton* expresseth in these words (*pur ceo que il n'ad aucun certaine ou sure estate*) (2). And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God (3). And the same law is of the lessee for yeares of tenant for life (4). So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corne, and if his wife die before him he shall have the corne (5). But if husband and wife be jointenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said, [a] that she shall have the corne (7). If tenant *pur terme d'auter vie* soweth the ground, and *cestuy que vie* dieth, the lessee shall have the corne. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enseint* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall [b] have the corne, because her estate was lawful, and defeated by the act of God, and it is good for the common-wealth that the ground be sowne (8). [c] But if the lessee at will sow the ground with corne, &c. and after he himself determine his will and refuseth to occupy the ground, in that case the lessor shall have the corne, because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband [d], the lessor shall have the embleaments, because that the determination of her owne estate grew by her owne act. But where the estate of the lessee being uncertaine is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c. [e] there he that hath the right paramount, or that entreteth for any forfeiture, &c. shall have the corne (10).

If a disseisor sow the ground and sever the corne, and the disseisee re-enter, [f] he shall have the corne, because he entreteth by a former title, and severance or remooving of the corne altereth not the case, for the regresse is a recontinuacion of the freehold in him in judgment of law from the beginning (11).

If 18. E. 4. 18.
(Cro. Cha. 515.)
Temps E. 1.
br. 25. 10. Aff.
pl. 6.
10. E. 3. 29.
46. E. 3. 1.
7. H. 4. 17.
7. Aff. 19.
5. Co. 116.
Oland's case.
(2. Inst. 81.
Hob. 132.
5. Co. 85.
1. Ro. Abr. 727.)

[a] 8. Aff. 21.
8 E. 3. 54.
Dyer 316. (6)
(Cro. Cha. 515.)
[b] 16. H. 6. 6.

[c] 5. Co. 116.
Oland's case. (9)
(1. Ro. Abr. 726.)

[d] Oland's case ubi supra.
(Dy. 31.
11. Co. 51. b.)

[e] 33. E. 3.
tresp. F. 254.
42. E. 3. 25.
Oland's case ubi supra.

[f] 27. H. 6. 1.
37. H. 6. 6.
12. E. 4. 45.
14. E. 4. 6.
15. E. 4. 31.
2. H. 7. 1.

5. H. 7. 17. 12. H. 7. 25. 10. H. 4. 1. 28. H. 8. 32. Dyer.

(4) [See Note 362.]
(5) [See Note 363.]

[55. b.]

(1) [See Note 364.]
(2) [See Note 365.]
(3) [See Note 366.]
(4) See Gouldsb. 144.

(5) [See Note 367.]
(6) 7. Aff. 13. 10. Aff. 6. 7. E. 3. 57.
Hal. MSS.
(7) [See Note 368.]
(8) [See Note 369.]
(10) Vid. 20. E. 3. Trespass 194. 46.
Aff. 2. Hal. MSS.
(11) [See Note 370.]

Lib. 1. Cap. 8. Of Tenant at Will. Sect. 68.

[g] 44. E. 3. 15.
Fleta, lib. 3.
cap. 15.

[g] If tenant by statute merchant soweth the ground, and then a sudden and casuall profit falleth by which he is satisfied, he shall have the emblements (12).

[b] 35. H. 6. 24.
21. H. 6. 9.
1. E. 4. 3.
21. E. 4. 5.
Pl. Com. parson
de Honyland's
case.

“*Le lessor luy puit ouster.*” There is an expresse ouster, and implied ouster: an expresse, as when the lessor commeth upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut downe a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawfull albeit the will doth continue. If a man leaseth a mannor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will (13). The lessor may by actuall entry into the ground determine his will in the absence of the lessee (14), but by words spoken from the ground the will is not determined untill the lessee hath notice (15). No more then the discharge of a factor, attorney, or such like in their absence is sufficient in law untill they have notice thereof.

(1. Ro. Abr. 860.
Post. 245. b.
3. Co. 89.
5. Co. 90.)
24. E. 4. 6.
3. E. 4. 11, &c.

[a] 5. Co. 10.
Henstead's case.
10. Eliz.
Dier 269. b.

[a] If a woman make a lease at will reserving a rent, and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt or distreine them for the rent. So if the husband and wife make a lease at will of the wife's land reserving a rent and the husband die, yet the lease continueth. In like manner if a lease be made by two to two others at will, and the one of the lessors or of the lessees die, the lease at will is not determined in neither of those cases; which are necessary points to be knowne (16).

“*Après l'embleer et devant que les blees sont matures.*” Then put the case that the corne is ripe and ready to cut downe, and the lessor, before the lessee reapeth it, enter and put out the lessee, whether shall the lessee have the corne? And it is without all question that the lessee shall have it, for by the same reason that he shall have it when he is put out before it be ripe, he shall have it when he is put out when it is ripe. *Et ubi eadem est ratio, ibi idem jus.*

[56. a.]

[b] Temps E. 1.
tit. Grant. 4.
9. E. 4. 35.
1. E. 3. tresp. 13.
21. H. 7. 14. b.
3. H. 6. 18. b.
2. R. 2.
barre 237.
14. H. 8. 2.
27. H. 8. 18. b.
(11. Co. 52.)

“*Et auxi franke entrie, egres et regres.*” [b] For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for the taking and enjoying of the same: *Quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest* (1): and the law in this case driveth him not to an action for the corne, but giveth him a speedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to carry it before it be ready to be caried; and therefore the law giveth

(12) See further on this subject infra, and also Perk. sect. 512. to 524. Vin. Abr. Emblements per tot. and Executor, U. Com. D. g. Biers, B. C. and G. New Abr. Executors and Administrators, H. 3. and Gilb. Law of Evid. 242. to 252.

(13) [See Note 371.]

(14) [See Note 372.]

(15) [See Note 373.]

(16) [See Note 374.]

[56. a.]

(1) See further on this maxim Finch. Disc. on Law 63. and Finch. Descript. of Law 16. b.

giveth all that which is convenient, viz. free entry, egress and regress as much as is necessary.

If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon his case, and recover his damages; and this action the law doth give unto him, for whensoever the law giveth any thing, it giveth also a remedy for the same. But here is to be observed a diversity betwene a private way, whereof *Littleton* here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shall he not have an action upon his case; and this the law provided for avoyding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case (2); and all this [c] was resolved by the court in the king's bench. And in that case it was said, that it had bene adjudged in that court betwene *Westbury* and *Powell*, that where the inhabitants of *Southwarke* had by custome a watering place for their cattell which was stopped up by *Powel*, that in that case any inhabitant of *Southwarke* might have an action; for otherwise they should be without remedy, because such a nuisance is not presentable in the leete or torne. Note the diversity.

There be three kinde of wayes, whereof you shall [d] reade in our ancient bookes. First, a foot way, which is called *iter, quod est jus eundi vel ambulandi hominis*; and this was the first way.

The second is a foot way and horse way, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also.

The third is *via* or *aditus*, which contains the other two, and also a cart way, &c. for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*: and this is twofold, viz. *regia via*, the king's highway for all men, *et communis strata*, belonging to a city or towne, or betwene neighbours and neighbours. This is called in our bookes *chimin*, being a *French* word for a way, whereof commeth *chiminage*, *chiminagium*, or *chimmagium*, which signifieth a toll due by custome for having a way through a forest; and in ancient records it is some time also called *pedagium* (3).

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadowes, or digging up of bushes or such like, make the grasse to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grasse, because that the grasse is the naturall profit of the earth. And the same law is if he doth sow hay-feed, and thereby encrease the grasse.

“*Auterment est si tenant pur terme d'ans que conust le fine de son terme, &c.*” Well said *Littleton* (which knoweth the end of his terme) that is, where the end of the terme is certaine; but where the lease for yeares depends upon an uncertainty, as upon the death of tenant for life being made by him, or of a husband seised in the right of his wife, or the like, there it is otherwise.

(2) [See Note 375.]

(3) See further as to ways tit. *Chimin* in

Com. Dig. and Vin. Abr. and tit. *Highway*, in New Abr. and Burn. Just.

Sect. 69.

ITEM, si un mese soit lessé a un home a tener a volunt, per force de quel le lessée enter en le mese, deins quel mese il porta ses utensils de meason, et puis le lessor luy ousta, uncore il avera franke entre egressé et regresse en mesme le mese per reasonable temps de carrier ses biens et utensils. Sicome home seisie d'un mese en fee simple, fee taile, ou par terme de vie, lequel ad certaine biens deins meme le mese, et fait ses executors et devy; queconque apres sa mort ad le mese, uncore les executors averont frank entry egressé et regres de carier hors de mesme le mese les biens lour testator per reasonable temps.

ALSO, if a house be letten to one to hold at will, by force whereof the lessee entreth into the house, and brings his household-stuff into the same, and after the lessor puts him out, yet he shall have free entrie egressé and regresse into the said house by reasonable time to take away his goods and utensils. As if a man seised of a mese in fee simple, fee taile, or for life, hath certaine goods within the sayd house, and makes his executors, and dieth; whosoever after his decease hath the house, his executors shall have free entry egressé and regresse to carrie out of the same house the goods of their testator by reasonable time.

“**S**I un mese soit lessé a un home a tener a volunt, &c.” The reason of this is evident upon that which hath been said before.

(2. Co. 32. a.)

“Mese,” or *Maison*, called in legall Latine *messuagium*, containeth [56. b.] (as hath beene said) the buildings, curtelage, orchard, and garden (1).

[a] 31. El. ca. 1. in Domesday.

[b] Reg. 153. F. N. B. 127.

4. E. 2.

Vouch. 244.

Six acres of land may be parcel of a house.

(Post. 200. b.)

[c] 22. E. 4. 27.

34. H. 6. 40.

(Cro. Jam. 335. 204.

Hob. 69. 135.

2. Instit. 4. 6.

2. Ro. Rep. 143.

153.

1. Ro. Abr. 523.

2. Ro. Abr. 578.

5. Co. 100. a.)

[d] Bract. li. 2.

ca. 52. b.

(Post. 59. b. 62. a.)

Cottage, *cotagium*, is a little house without land to it. [a] See 31. Eliz. cap. 1. and cottagers in Domesday booke are called *cottarelli*; and in ancient records *haga* signifieth a house. If a man hath a house neer to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, [b] I may have a writ *de domo reparandâ*, and compell him to repair his house (2). But a *præcipe* lieth not *de domo*, but *de messuagio*.

“Per reasonable temps.” [c] This reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customes, and services, upon the true state of the case depending before them: for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices [d]. *Quàm longum esse debet non desinitur in jure, sed pendet ex discretione justitiariorum.* And this being said of time, the like may be said of things uncertaine, which ought to be reasonable; for nothing that is contrary to reason, is consonant to law.

[e] 2. H. 6. 15.

21. H. 6. 30.

[e] “Sicome home seisie d'un mese en fee simple, ou fee taile, &c.” This is so evident, as it needeth no explanation.

(1) See ante 5. b. note 1. where some authorities are cited to shew, how much will pass by the word *messuage*. (2) [See Note 376.]

Sect. 70.

ITEM, si un home fait un fait de feoffment a un auter de certaine terre, et deliver a luy le fait, mes nemy liverie de seisin; en ceo case celui, a que le fait est fait, poit enter en le terre, et tener et occuper a la volunt celui, que fist le fait pur ceo que il est prove per les parols del fait, que il est la volunt que le auter avera la terre; mes celui que fist le fait luy poet ouster quaut luy pleist.

ALSO, if a man make a deed of feoffment to another of certaine lands, and delivereth to him the deed, but not liverie of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him, which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

HERE it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreth by the consent of the feoffor. (1. Ro. Abr. 8. 9. 2. Co. 55. b.)

“ Et deliver a luy le fait.” Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its naturall effect to make it a deed. [f] *Donationum alia perfecta, alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, ac traditio nondum fuerit subsequuta.* But if the deed be delivered in name of seisin of the land, or if the feoffor saith to the feoffee, Take and enjoy this land according to the deed; or, Enter into this land, and God give you joy; these words do amount to a livery of seisin.

(6. Co. 26. Ante 43. a.)

[f] Flet. li. 3. ca. 3. & ca. 15. 43. E. 3. tit. Feof. & Faits 51. 35. H. 8. Feof. Br. 27. Aff. 61. 38. Aff. 2.

39. Aff. 12. 41. E. 3. 17. 6. Co. 26. Sharp's case. (Ante 43. a.)

Sect. 71.

ITEM, si un mese soit lessé a tener a volunt, le lessé n'est pas tenu a sustainer ou repaier le meason, sicome tenant a terme d'ans est tenu. Mes si le lessé a volunt fait voluntarie wast, sicome en abatement des measons, ou en couper des arbres, il est dit que le lessor avera de ceo envers luy action de trespass. Sicome jeo bayle a un home mes barbits a compester sa terre, ou mes boefes a arer la terre, et il occist mes avers, jeo puissoy bien aver un action de trespass envers luy, nient obstant le bailement.

ALSO, if a house be leased to hold at will, the lessee is not bound to sustain or repaire the house, as tenant for terme of years is tyed. But if tenant at will commit voluntary wast, as in pulling downe of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee. As if I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

(5. Co. 13. b.) “ *SI un mese soit lessé a tener a volunt, le lessée n'est pas tenu, &c.*”
For the statute of Gloucester above mentioned extends not to a tenant at will, and therefore for permissive waste, the lessor hath no remedy at all (1).

[g] 21. H. 6. 38. “ *Mes si lessée a volunt fait voluntary waste, &c.*” [g] And true it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and prostrate houses, the lessor shall have an action of trespassse against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; [b] and so hath it beene adjudged (2).

(1. Ro. Abr. 860. 2. Ro. Abr. 555.) [b] Mich. 28. & 29. Eliz. Rot. 318. in Com. Banc. inter Walgrave & Somerset. V. le Counte de Shrewsburie's case, 5. Co. 13. b.

[i] 27. H. 6. 3. [i] If tenant at will granteth over his estate to another, and the grantee entrencheth, he is a disseisor (3), and the lessor may have an action of trespassse against the grantee; for albeit the grant was void, yet it amounteth to a determination of his will.
(2. E. 4. 5. (2. Inft. 154. 1. Ro. Abr. 661. 663. 659. Post. 57. b. Cro. Cha. 303. Cro. Jam. 660. 4. Leon. 35.)

[k] V. 11. H. 4. “ *Sicome jeo baile a un home mes barbits a compester son terre, &c.*”
And the reason is, [k] that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespassse *sur le case* for this conversion, at his election (4).

Fleta, li. 2. ca. 1. “ *Trespasse.*” *Transgressio derivatur à transgrediendo*, because it passeth that which is right: *Transgressio autem est, cum modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere, et mensuram.* Nota, in the lowest and the highest offences there are no accessaries, but all are principalls; as in ryots, routs, forcible entries, and other transgressions *vi et armis*, which are the lowest offences; and so in the highest offence, which is *crimen læsæ majestatis*, there be no accessaries; but in felonies there be accessaries both before and after.

[57. b.]

Sect. 72.

NOTA, si le lessor sur tiel lease a volunt reserve a luy un annuall rent, il poit distrainer pur le rent arere, ou aver de ceo un action de debt a son election.

NOTE, if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his owne election (1).

21. H. 7. 39. b. “ *IL poet distreyner pur le rent arere, ou aver de ceo un action de debt, &c.*” But if he impound the distresse upon the ground letten at will, the will is determined. Note, he may distreine for the rent, and yet it is no rent service, for no fealty belongeth thereunto, but a rent distreinable of common right.

There

(1) [See Note 377.]

(2) [See Note 378.]

(3) [See Note 379.]

(4) [See Note 380.]

[57. b.]

(1) [See Note 381.]

There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth in possession and wrongfully holdeth over (2). [1] As tenant *pur terme d'antier vie* continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespassse before entry. Now that a writ of entry *ad terminum qui præterit* lyeth against such a tenant as holdeth over is rather by admission of the demandant, then for any estate of freehold that is in him, for in judgement of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases abovesaid is an intruder upon the king, because there is no laches imputed to the king for not entring (4). [m] If tenant in taile of a rent grant the same in fee and dieth, yet the issue in taile may bring a *formedon*, and admit himselfe out of possession. The like law is it, if a man maketh a lease at will and dieth, now is the will determind; and if the lessee continueth in possession, he is tenant at sufferance, and yet the heyre by admission may have an assise of Mordancestor against him (5). [n] But there is a diversity between particular estates made by the *terre tenaunt*, as above is said, and particular estates created by act in law: as if a gardian after the full age of the heire continueth in possession, he is no tenant at sufferance, but an abator, against whom an assise of Mordancestor doth lye (6). *Et sic de familibus* (7).

21. H. 6. 54. 5. E. 4. 3. 22. R. 2. tit. Discont. 48. E. 3. 23. Pl. Com. 435. 19. E. 3. bre. 468. 15. E. 4. Discont. 30. 6. E. 3. 56, 57. 21. E. 4. 5. 21. H. 7. 38. 10. E. 4. 18. Per Choke & Litt. [n] Statute de Merlbridge, cap. 26. Abb. Ass. 120. b. F. N. B. 196. 21. E. 4. 10. & 11. Bract. lib. 4. fo. 252, 253. (Post. 271. 1. Ro. Abr. 663.)

[1] Bracton, lib. 4. fol. 318.
4. E. 3. 39.
7. E. 3. 13.
24. E. 3. 24.
38. E. 3. 28.
7. R. 2. Saver de def. 30.
8. E. 4. 25.
4. H. 6. 30.
22. E. 4. 38.
18. E. 4. 25.
F. N. B. 201.
D. 203. 8. E. 2. entre 87.
Temps H. 8.
Br. 15. tit.
Tenant a volunt.
Pl. Com. 138.
4. H. 7. 3. (3)
(Post. 270. b.
Cro. Cha. 187.
Cro. Jam. 169.
Ante 57. 2.)
[m] 13. H. 7. 10. a.

(2) [See Note 382.]

(3) Vid. 21. H. 6. 38. Hal. MSS.

(4) 4. H. 6. 12. Hal. MSS.

(5) [See Note 383.]

(6) [See Note 384.]

(7) See further as to tenant by sufferance in title *Estate*, Vin. Abr. and Com. Dig.

CHAP. 9.

Tenant by Copie.

Sect. 73.

TENANT per copie de court rol' est (8), deins quel manor il y ad un custome que ad est use de temps dont memorie ne court, que certaine tenants deins mesme le manor ont use d'aver terres et tenements, a tener a eux et a lour heires en fee simple, ou en fee taile, ou a terme de vie, &c. a volunt le seignior solonque le custome de mesme le manor.

TENANT by copy of court roll is, as if a man be seised of a manor within which manor there is a custome, which hath beene used time out of minde of man, that certaine tenants within the same manor have used to have lands and tenements, to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c. at the will of the lord (1) according to the custome of the same manor.

(3. Co. 7.
Heydon's case.
1. Ro. Abr.
498.)

“**T**ENANT per copie, &c.” *Tenens per copiam rot. Cur’.* Copie we call in *Latine copiam*, though *copia* in his proper signification signifieth plenty; but we have made a *Latine* word of the *French* word *copie*: and this is ancient; for in the *Register*, fol. 51. there is a writ *de copiâ libelli deliberandâ*, which is grounded upon the statute of 2. H. 2. ca. There is no tenant in the law that holdeth by copie, but onely this kinde of customary tenant, for no man holdeth by copie of a charter, or by copy of a fine, or such like, but this tenant holdeth by copy of court roll.

[58. a.]

[a] Bracton,
lib. 2. cap. 8.
fol. 26. & lib. 4.
fol. 209.
Britton, 165.
Fleta, lib. 1.
ca. 8. & lib. 2.
cap. 6.
Item de custu-
mariis.
Ockham Cap.
quid murdrum.
F. N. B.
f. 12. c.

[b] 1. H. 5. 11.
14. H. 4. 34.
42. E. 3. 25.
Vid. 4. Co. 2.
Browne's case.

[c] Lamb. verb.
Terra ex scripto.

[a] Bracton calleth copiholders *villanos sockmannos*, not because they were bond, but because they held by base tenure, by doing of villein services.

And Britton saith, that some that be free of blood doe hold land in villenage; and Littleton himselve in the next Chapter calleth them tenants by base tenure; and in *F. N. B.* fol. 12. C. *Et cest terme, que est ore a cest jour appel copitenaunts, ou copiholders, ou tenaunts per copie, est forsque un novel nosme trove, car d'ancien temps ils fuer' appellees tenants in villenage, ou de base tenure, &c.* [b] And yet in 1. H. 5. 11. they be called copiholders; in 14. H. 4. 34. *tenant per le verge*; in 42. E. 3. 25. *tenant per roll solonque le volunt le seignior*; and in the statute of 4. E. 1. called *extenta manerii*, they are called *custumarii tenentes*, and so doth Fleta call them; and before him Ockam (2) (who wrote in the raigne of H. 2.) spake of them, and how, and upon what occasion they had their beginning.

[c] *Terra ex scripto Saxonice Bockland. Fundum veteres aut ex scripto qui Bockland, i. bockland, aut sine scripto qui Folkland dicebatur, possidebant. Quæ fuit ex scripto possessio commodiore erat possessione, libera, atque immunis. Fundus sine scripto censum pensitabat annuum, atque officiorum servitute quâdam est obligatus. Priorem viri plerumque nobiles atque ingenui, posteriorem rustici fere et pagani possidebant* (3).

(4. Inst. 268.) “Court.” *Curia*, court, is a place where justice is judicially ministred, and is derived à *cura*, quia in *curiis publicis curas gerebant*.

(8) Si come un home soit seise d'un maner.
L. and M.—Roh.—P. and Red.

[58. a.]

(1) [See Note 385.]

(2) [See Note 386.]

(3) See ante 5. b. and note 1. there, and 6. a. and note 6. there.

bant [d]. The court baron must be holden on some part of that which is within the mannor, for if it be holden out of the mannor it is voyd; unlesse a lord being seised of two or three manors hath usually time out of mind kept at one of his manors courts for all the said manors, then by custome such courts are sufficient in law, albeit they be not holden within the severall manors (4). And it is to be understood that this court is of two natures. The first is by the common law, and is called a court baron, as some have said, for that it is the freeholders or freemens court (for barons in one sense signifie freemen), and of that court the freeholders being suitors be judges, and this may be kept from three weekes to three weekes. The second is a customary court, and that doth concerne copiholders, and therein the lord or his steward is the judge. Now as there can be no court baron without freeholders, so there cannot be this kind of customary court without copiholders or customary holders. And as there may be a court baron of freeholders only without copiholders, and then is the steward the register, so there may be a customary court of copiholders onely without freeholders, and then is the lord or his steward the judge (5). And when the court baron is of this double nature, the court roll containeth as well matters appertaining to the customary court, as to the court baron.

And for as much as the title or estate of the copiholder is entred into the roll whereof the steward delivereth him a copie, thereof he is called copiholder. [e] It is called a court baron, because among the lawes of king *Edward the Confessor* it is said: *Barones verò qui suam habent curiam de suis hominibus, &c.* taking his name of the baron who was lord of the mannor, or for that properly in the eye of law it hath relation to the freeholders, [f] who are judges of the court. And in ancient charters and records the barons of *London*, and barons of the *Cinque Ports*, do signify the freemen of *London* and of the *Cinque Ports*.

“*Seisie d’un mannor.*” *Manerium dicitur à manendo secundum excellentiam sedes magna fixa et stabilis. Lageman, i. habens focam et facam super homines suos, &c.* [g] Et sciendum est, quòd manerium poterit esse per se ex pluribus ædificiis coadjuvatum sive villis et hamlettis adjacentibus. Poterit etiam esse manerium et per se et cum pluribus villis, et cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per se sed villæ sive hamlettæ. Poterit etiam esse per se manerium capitale, et plura continere sub se maneria non capitalia, et plures villas et plures hamlettas quasi sub uno capite aut dominio uno. And afterwards, *Manerium autem fieri poterit ex pluribus villis vel unâ, plures enim villæ poterunt esse in corpore manerii sicut et unâ* (6). And in these [h] ancient authors you shall see the difference *inter mansionem, villam, et manerium*. Concerning the institution of this court by the lawes and ordinances of ancient kings, and especially of king *Alfred*, it appeareth that the first kings of this realme had all the lands of *England* in demeane (1), and *les grand manors et royalties* they reserved to themselves, and of the remnant they, for the defence of the realme, enfeofed the barons of the realme with such jurisdiction as the court baron now hath, and instituted the freeholders to be judges of the court

[d] Vid. 4. Co. 24. inter *Murrell & Smith*. Eodem lib. fol. 27. inter *Clifton & Molineux*. (1. Ro. Abr. 527.) 4. Co. 26. *Melwitche’s case*. Britton, fol. 274. (4. Co. 26. b.)

[e] Lamb. fol. 128. & 136. *Cambden Brit.* fo. 121. b. Britton, fol. 274. [f] *Mirror*, cap. 1. sect. 3.

Domesday.

[g] *Bracton*, lib. 4. fo. 112. *Fleta*, lib. 4. c. 15. & lib. 6. cap. 49. Britton, fol. 124.

[h] *Bract.* lib. 5. fo. 434. *Fleta*, ubi supra. *Mirror*, cap. 1. sect. 3.

[58. b.]

(4) [See Note 387.]

(5) [See Note 388.]

(6) For other explanations of the word *manor*, see in *Cow. Interp. voc. Manor*, and the books there cited, particularly *Fulb.*

Paral. part 1. fol. 18. a.

[58. b.]

(1) See as to this ante i. b. and the authorities in note 1. there.

court baron. And herewith agreed the aforesaid law of Saint Edward. And it is to be observed, that in those ancient lawes under the name of barons were comprised all the nobility.

(1. Co. 140. b.
Cro. Jam. 260.
Mo. 95.
8. Co. 63. b.
1. Ro. Abr. 499.
4. Co. 26. b.
23. b. Cro.
Jam. 98.)

There may be a customary manor granted by copy of court roll (2). So although the word be (*seisie*) which properly betokeneth a freehold, yet tenant for yeares, tenant by statute merchant, staple, *elegit*, and tenant at will, gardian in chivalrie (3), &c. who are not properly seised but possessed, are *domini pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copihold lands which come into their hands (4). And therefore there is a diversity between disseisors, abators, intruders, and others that have defeasible titles; for their voluntary grants of ancient copihold lands shall not bind the disseisees or others that right have (5). And voluntary grants by copie, made by such particular tenants as is aforesaid, shall binde him that hath the freehold and inheritance, because all these be lawfull lords for the time being; but so is not a tenant at sufferance, because he is in by wrong, as hath been said; and so [i] was it adjudged *P. 29. Eliz. inter Rowse et Artois*, 4. Co. 24. But admittances made by disseisors, abators, intruders, tenants at sufferance, or others that have defeasible titles, stand good against them that right have, because it was a lawfull act, and they were compellable to doe them.

[i] 4. Co. 24.
P. 29. Eliz.
inter Rous &
Artois.

[k] Dier. Mich.
7. & 8. Eliz.
Manuscript.

[k] And yet in some speciall case an estate may be granted by copie, by one that is not *dominus pro tempore*, nor that hath any thing in the manor. As if the lord of a manor by his will in writing deviseth, that his executor shall grant the customary tenements of the manor according to the custome of the manor for the paiement of his debts, and dieth, the executor having nothing in the manor, may make grants according to the custome of the manor (6).

“*Deins quel mannor il y ad un custome, que ad este use de temps dont memory ne court, &c.*” Of this custome here spoken of there be three supporters. The first is time, and that must be out of memory of man, which is included within this word (custome), so as copihold cannot begin at this day. [l] The second supporter is, that the tenements be parcell of the manor or within the manor, which appears by these words of *Littleton*, *que certaine tenants deins mesme le mannor, &c.* The third supporter is, that it hath beene demised and demisable by copie of court roll; for it need not be demised time out of mind by copie of court, but if it be demisable it is sufficient. For example: if a copihold tenement escheat to the lord, and the lord keepeth it in his hands by many yeares, during this time it is not demised but demisable, for the lord hath power to demise it againe (7).

[l] Vid. 4. Co.
24. inter Murrel
& Smith.

“*A volunt le seignior solonque le custome.*” So as he is not a bare tenant at will, but a tenant at will according to the custome of the mannor, as shall be spoken more hereafter in this Chapter.

(1. Ro. Abr. 498.)
11. Co. 17.
Sir H. Nevill's
case. 4. Co. 20,
31. inter Hoe
& Tayler.

“*Certaine tenements.*” What things may be granted by copy, is necessary to be knowne. First, a manor may be granted by copy (8). Secondly, underwoods without the soile may be granted by copy to one

(2) This is denied in Cro. Jam. 260. and is a point which has been much controverted. See Vin. Abr. *Copihold*, E. and Com. Dig. *Copihold*, C. 1.

(3) [See Note 339.]

(4) [See Note 390.]

(5) [See Note 391.]

(6) [See Note 392.]

(7) [See Note 393.]

(8) See note 2. supra.

one and to his heires, and so may the herbage or vesture of land. Thirdly, generally all lands and tenements within the manor and whatsoever concerneth lands or tenements may be granted by copie: as a faire appendant to a mannor may be granted by copy, &c. (9).

“*Consuetudines.*” This word *consuetudo* being derived à *consuetudo*, properly signifieth a custome, as here *Littleton* taketh it: but in legall understanding it signifieth also tolles, murage, pontage, paviage, and such like newly granted by the king; and therefore when the king grants such things, the words be, *Concessimus, &c. in auxilium villæ prædictæ paviamus &c. consuetudines subscriptas, viz. de quolibet sunnagio, &c.*

And it was an article of the justices in eire to inquire *de novis consuetudinibus levatis in regno, sive in terrâ, sive in aquâ, et quis eas levavit et ubi*; where *consuetudo* is taken for tolles and such like taxes or charges upon the subject.

Regist. F. N. B.
270. d.
V. Mag. Carta
in cap. Itin.
fol. 151.
Bract. lib. 3.
117.
Fleta, lib. 1.
cap. 20.

Sect. 74.

ET tiel tenant ne puit alien sa terre per fait, car donques le seignior poit entre come en chose forfeit a luy. Mes s'il voit alien sa terre a un auter, il covient solonque ascun custome de surrender les tenements en ascun court, &c. en le maine le seignior, al use celuy que avera le state, en tiel forme, ou a tiel effect.

Ad hanc curiam venit *A. de B.* et sursum reddidit in eadem curiâ unum mesuagium, &c. in manus domini, ad usum *C. de D.* et hæredum suorum, vel hæredum de corpore suo exeuntium, vel pro termino vitæ suæ, &c. Et super hoc venit prædictus *C. de D.* et cepit de domino in eadem curiâ mesuagium prædictum, &c. Habendum et tenendum sibi et hæredibus suis, vel sibi et hæredibus de corpore suo exeuntibus, vel sibi ad terminum vitæ, &c. ad voluntatem domini, secundum consuetudinem manerii, faciundo et reddendo inde redditus, servitia, et consuetudines inde prius debita et consueta, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, &c.

AND such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c. into the hands of the lord, to the use of him that shall have the estate, in this forme, or to this effect.

A. of B. commeth into this court, and surrendreth in the same court a mease, &c. into the hands of the lord, to the use of *C. of D.* and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid *C. of D.* and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therfore the rents, services, and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

(9) [See Note 394.]

Lib. I. Cap. 9. Of Tenant by Copie. Sect. 74.

(1. Ro. Abr. 509.)

Lib. intrat. 131.
4. Co. 25. b.
inter Kite &
Queinton.

“ *ET* tiel tenant ne puit aliener sa terre, &c.” And this is true in [59. a.]
case of alienation (1), but when a man hath but a right to
a copihold, he may release it by deed or by copie, to one that is ad-
mitted tenant *de facto* (2).

“ *Alien per fait.*” Here it appeareth by *Littleton*, that there
must be an alienation; for the making of the deed alone, unlesse
somewhat passe thereby, is no forfeiture. As if he make a charter
of feoffment, or a deed of demise for life, and make no livery, this is
no forfeiture, because nothing passeth, and therefore no aliena-
tion (3); but otherwise it is of a lease for yeares (4).

“ *Forfeit a luy.*” This adjective in *Latine* is *forisfactus*, the
verbe is *forisfacere*, and the nowne *forisfactura*. They are all de-
rived of *foris*, (that is) *extra*, and *facere*, *quasi diceret, extra legem seu*
consuetudinem facere, to do a thing against or without law or custome;
and that legally is called a forfeiture. *Littleton* useth this word but
once in all his booke. What shall be said [k] forfeitures of copi-
holds you may read at large in my Reports (5).

[k] 4. Co. inter
les copihold cases
21. 23. 25. 27.
28. 8. Co. 92.

99. 100.

9. Co. 75. 107.
10. Co. 131.

[l] Bract. lib. 2.
cap. 8. & lib. 4.
49. 15. H. 4. 34.
1. H. 5. 11.

“ *En ascun court.*” [l] This is the generall custome of the realme,
that every copiholder may surrender in court, and need not to al-
leage any custome therefore. So if out of court he surrender to the (1. Ro. Abr. 509.)
lord himselfe, he need not alledge in pleading any custome. But if 9. Co. 76.)
he surrender out of court into the hands of the lord by the hands of
two or three, &c. copiholders, or by the hands of the bayliffe or
reeve, &c. or out of court by the hand of any other, these customes
are particular, and therefore he must plead them (6).

[m] Bract. lib. 4.
fol. 209. &
lib. 2. cap. 8. ac.
14. H. 4. 34.

[m] *Bracton*, lib. 4. fol. 209. speaking of these kind of customary
tenants, saith, *Dare autem non possunt tenementa sua, nec ex causâ dona-*
tionis ad alios transferre non magis quàm villani puri; et unde si trans-
ferre debeant, restituant ea domino vel ballivo, et ipsi ea tradant aliis in [59. b.]
villenagium tenenda. But although it be incident to the estate of a
copihold to passe, as our author saith, by surrenders. [b] yet so for-
cible is custome, that by it a freehold and inheritance may also passe
by surrender (1) (without the leave of the lord) in his court, and be
delivered over by the bailly to the feoffee, according to the forme of
the deed, to be inrolled in the court or the like.

[b] Coram rege
Mich. 31. E. 3.
Ranulph. Hunt-
ingfield's case.
3. E. 3.
Corona 310.
11. H. 4. 83.
per Thorning.

“ *Ad hanc curiam venit A. de B. et sursum reddidit, &c.*” Here
Littleton putteth an example of a surrender in court, and in this ex-
ample three [c] things are to be observed.

[c] Vide 4. Co.
inter les cases de
copiholds.

First, that the surrender to the lord be generall without expressing
of any estate (2), for that he is but an instrument to admit *Cesty a*
que use, for no more passeth to the lord, but to serve the limitation
of the use (3); and *Ce' que use*, when he is admitted, shall be in by
him that made the surrender, and not by the lord (4).

Secondly,

- [1] [See Note 395.]
[2] [See Note 396.]
[3] [See Note 397.]
[4] [See Note 398.]
[5] See also tit. *Copihold*, in Vin. Abr. D.
c. to E. d. 2. New Abr. L. and Com.
Dig. M.
[6] [See Note 399.]

[59. b.]

- [1] [See Note 400.]
[2] [See Note 401.]
[3] See post. 62. a. and Jefferies's case
cited from Willf. in note 1.
[4] Acc. by Wilnot justice in 4. Burr.
vol. 3. p. 1543. and see further as to this
Yelv. 223. 4. Co. 27. b. Com. Dig. *Cop-*
ihold, F. 14. and Gilb. Ten. 3d Lond. ed.
257.

Secondly, if the limitation of the use be generall, then *Ce' que use* taketh but an estate for life, and therefore here *Littleton* expresseth upon the declaration of the use, the limitation of the estate, viz. in fee simple, fee taile, &c.

Thirdly, the lord cannot grant a larger [d] estate then is expressed in the limitation of the use. *Littleton* here putteth his case of one. If two joyntenants be of copihold lands in fee, and the one out of court according to the custome surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dyeth, and at the next court the surrender is presented, by the surrender and presentment the joynture was severed, and the devisee ought to be admitted to the moitie of the lands, for now by relation the state of the land was bound by the surrender (5).

"*In manus domini.*" *Dominus manerii*, the lord of a manor, is described [e] by *Fleta* as he ought to be, in these words. *In omnibus autem et supra omnia decet quemlibet dominum verbis esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum odientem, voluntariosque, malevolos, et injuriosos contemnentem, et apud proximos pietatem vultumque motibilem et plenum, ipsius enim interest potius consilio quam viribus uti, proprio arbitrio. Non conjuilibet voluntarii juvenis menestralli, vel adulatoris, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, concilio debet favere. Qui bene sibi vult disponere et familie sue, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatem suarum facultatum et finem annuarum expensarum.* And the residue is fit for every lord of a manor to know and follow, which were too long here to be recited; only his conclusion having spoken of the lord's revenue and expences I will adde, *Quæ omnia distinctè scribantur in membranis, ut perinde sagaciùs vitam suam disponat et faciliùs convincat mendacia compositiorum.*

[f] If the lord of the manor for the time being be lessee for life or for yeares, gardian, or any that hath any particular interest, or tenant at will of a manor, (all of which are accounted in law *domini pro tempore*) and doe take a surrender into his hands, and before admittance the lessee for life dyeth, or the yeare's interest or custody doe end or determine, or the will is determined, though the lord commeth in above the lease for life or for yeares, the custody or other particular interest or tenancy at will, yet shall he be compelled (6) to make admittance according to the surrender; and so was it holden in 17. *Eliz.* in the earl of *Arundel's* case, which I my selfe heard.

"*Et dat domino de fine.*" For the signification of this word (*finis*), Vide Sect. 174. 182. 194. 441.

Of fines due to the lord by the copiholder, some be by the change or alteration of the lord (7), and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant either by the act of God, or by the act of the party, a fine may be due: for if the lord doe alledge a custome within his manor to have a fine of every

[d] Mich. 2. & 3. Ph. & M. in Com. Banco, by the whole court in Constable's case of Pickenham in Norfolk.

[e] *Fleta*, lib. 2. c. 65. & 71.

[f] See more of this 4. Co. the cases of copiholds. Trin. 1. Ja. Rot. 854. inter Shapland & Ridler in repl. in Com. Banco, the case of the gardian in socage adjudged. (Cro. Jam. 98. 6. Co. 60. b.)

(5) M. 3. Jac. B. R. *Crook* n. 30. *Porter* and *Porter*. Hal. MSS.—See Cro. Jam. 100. by which the case appears to have been adjudged according to lord Coke's doctrine of relation. See further as to the relation of

Surrenders in Vin. Abr. *Copihold*, T. b.

(6) [See Note 402.]

(7) Vid. for takages in Wales on charge of the lord, 34. H. 8. c. 26. Hal. MSS.—See Sect. 93.

Lib. 1. Cap. 9. Of Tenant by Copie. Sect. 75, 76.

[g] T. 39. Eliz. betweene the copiholders of the manor of Guiltirns in the county of Northumberland, and Armestrong lord of the manor, in chancerie.

(11. Co. 44. a. Cro. Cha. 196. 2. Ro. Abr. 578.)

[b] Pasch 1. Jac. in com. banco rot. 1845. inter Stallion & Brady.

[i] 4. Co. the cases of copiholds.

every of his copiholders of the said manor at the alteration or change of the lord of the manor, be it by alienation, demise, death, or otherwise; this is a custome against the law, as to the alteration or change of the lord by the act of the party, for by that meanes the copiholders may be oppressed by multitude of fines, by the act of the lord. But when the change groweth by the act of God, there the custome is good as by the death of the lord. And this, upon a case in the chancery [g] referred to sir John Popham chiefe justice, and upon conference with *Anderson, Periam, Walmesley*, and all the judges of *Serjeants Inn* in *Fleetstreet*, was resolved, and so certified into the chancery. But upon the change or alteration of the tenant (8), a fine is due unto the lord.

Of fines taken of copiholders some be certaine by custome, and some be incertaine, but that fine, though it be *incertus*, yet must it be *rationabilis*. And that reasonablenesse shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause dependeth, adjudgeth the fine exacted unreasonable, then is not the copiholder compellable to pay it (1). And so was it adjudged: [b] for all excessivenesse is abhorred in law. See more concerning fines of copiholders in my Reports [i], which are so plainly there set downe, as they need not be rehearsed here.

[60. a.]

Sect. 75.

ET tiels tenants sont appellez tenants per copie de court rolle; pur ceo que ils n'ont auter evidence concernant leur tenements, forsque les copies des rolles de court.

AND these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

(4. Co. 25.)

“*ILS n'ont auter evidence.*” This is to be understood of evidences of alienation; for a release of a right by deed a copiholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the copyhold, which he that maketh the release had (2).

Sect. 76.

ET tiels tenants ne empleront, ne serront empledes de leur tenements per brieve le roy. Mes s'ils voient empler auters pur leur tenements, ils averont un plaint fait en le court le seignior en tiel forme, ou a tiel effect: A. de B. queritur versus C. de D. de placito terræ, videlicet, de uno mesuagio, quadraginta acris terr', quatuor acris

AND such tenants shall neither implead, nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lord's court in this forme, or to this effect: *A. of B. complains against C. of D. of a plea of land, viz. of one messuage, forty acres*

[60. a.]

(8) [See Note 403.]

(1) [See Note 404.]

(2) [See Note 405.]

acris prati, &c. cum pertin'. et facit protestationem sequi querelam istam in naturâ brevis domini regis assisæ mortis antecessoris ad communem legem, vel brevis domini regis assisæ novæ disseisinæ ad communem legem, aut in naturâ brevis de formâ donationis in discender ad communem legem, *ou en nature d'ascun auter brieve, &c.* Plegii de prosequendo F. G. &c.

acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of mordancester at the common law, or of an assise of novel disseisin, or formedon in the discender at the common law, or in the nature of any other writ, &c. Pledges to prosecute F. G. &c.

"*T*IELS tenants ne empleront, ne serront empledes, &c." This is evident, and needs no explanation: 4. H. 4. 34. adjudged in parliament.

"*Mes s'ils voient empler auters, ils averont, &c.*" Put the case that the demandant in a pleint in nature of a reall action recovereth the land erroneously, what remedy for the party grieved? For he cannot have the king's writ of false judgement in respect of the baseness of the estate and tenure, being in the eye of the law but a tenant at will. And the freehold being in another, he shall have a petition to the lord in the nature of a writ of false judgement, and therein assigne errors, and have remedy according to law.

14. H. 4. 34.
1. H. 5. 11.
Vet. N. B. 18.
13. R. 2. tit.
Faux judgment.
7. E. 4. 19.
21. E. 4. 80.
(4. Co. 21. b.)

"*De formâ donationis in discender ad communem legem.*" By the opinion of Littleton, as there may be an estate taile by custome with the co-operation of the statute of W. 2. cap. 1. so may he have a *formedon in discender*; but as the statute without a custome extendeth not to copiholds (3), so a custome without the statute cannot create an estate taile. Now it is not a sufficient proove, that lands have been granted in taile; for albeit lands have antiently and usually beene granted by copie to many men and to the heires of their bodies, that may be a fee simple conditionall, as it was at the common law. But if a remainder have been limited over such estates and enjoyed; or if the issues in taile have avoided the alienation of the ancestor, or if they have recovered the same in writs of *formedon* in the discender, these and such like be proofes of an estate taile. [y] But if by custome copihold may be intailed, the same by like custome by surrender may be cut off (1); and so hath it beene adjudged. [z] Some have holden that there was a *formedon* in the discender at the common law (2).

3. Co. 8, 9. in Heydon's case.
4. Co. 22, 23.
15. H. 8. Br. tit. Taile.
(3. Co. 8. b.
1. Ro. Abr. 838.)

Effex. 21. Eliz. Dier 366. 23. Eliz. Dier 373.
Pl. Com. 240. 4 E. 2. Formdon 50.

[z] 10. E. 2. Formdon 55. 21. E. 3. 47.

(1. Ro. Abr. 506.
1. Sid. 267. 3. 4.
Cro. Eliz. 717.)
[y] P. 29. Eliz. inter Hill. & Upcheic.
Custome deins le manor de Overhall in

Sect. 77.

ET coment que ascun tiels tenants ont inheritance solonque le custome del manor, uncore ils n'ont estate forsque a volunt

AND although that some such tenants have an inheritance according to the custome of the manor, yet

(3) [See Note 406.]

[60. b.]

(1) [See Note 407.]

(2) See further as to intails of copyholds in Vin. Abr. *Copyhold*, F. E. G. e.

a volunt le seignior solongue le course del common ley. Car il est dit, si le seignior eux austa, ils n'ont auter remedy forsque de fuer a leur seigniors per petition; car s'ils averont auter remedie, ils ne serront dits tenants a volunt le seignior solongue le custome del manor. Mes le seignior ne voile enfreinder le custom que est reasonable en tiels cases (3).

Mes Brian chiefe justice dit, que son opinion ad tous foits este, et unquez ferra, si tiel tenant per le custome payant ses services soit ejeté per le seignior, que il avera action de trespass vers luy. H. 21. Ed. 4. Et issint fuit l'opinion de Danby chiefe justice, M. 7. Ed. 4. Car il dit, que le tenant per le custome est cibien inheritor de aver son terre solongue le custome, come cestuy que ad franktenement al common ley.

yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord doe oust them, they have no other remedy but to sue to their lords by petition; for if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custome which is reasonable in these cases.

But *Brian* chiefe justice said, that his opinion hath alwaies been, and ever shall be, that if such tenant by custome paying his services be ejected by the lord, he shall have an action of trespass against him. *H. 21. Ed. 4.* And so was the opinion of *Danby* chiefe justice in *7. Ed. 4.* For he saith, that tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law (1).

13: E. 3. tit. Præscript. 10.
13. R. 2. faux judgement 7.
32. H. 6. tit. Subpena 2.
7. E. 4. 19.

Vide Sect. 81,
82. 84. 132.

[b] Vid.
42. E. 3. 25.
Brit. fol. 165.

“*CAR (il est dit) que si le seignior, &c.*” And here *Littleton* saith truly that it is said so, for so it is said in 13. E. 3. 13. R. 2. 32. H. 6. & 7. E. 4. 19.

But he setteth not downe his owne opinion, but rather to the contrary, as hereafter in this Chapter appeareth. But now *magistra rerum experientia* hath made this cleare and without question, that the lord cannot at his pleasure put out the lawfull coppiholder without some cause of forfeiture, and if he do, the coppiholder may have an action of trespass against him; for albeit he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii* (4).

[b] And *Britton* speaking of these kinde of tenants saith thus: *Et ceux sont privileges en tiel maner, que nul de les doit ouster de tiels tenements, tant come ilz font les services que a leur tenements appendent, ne nul ne poet leur services acrestre ne change a faire autres services ou plus.* And herewith agreeth fir *Robert Danby*, chiefe justice of the court of common pleas, *M. 7. E. 4. 19.* and fir *Thomas Brian* his successor, *M. 21. E. 4. 80.* viz. that the copyholder doing his customes and services, if he be put out by his lord, he shall have an action of trespass against him.

[61. a.]

(1) This must be understood with exception of such copyholds, as by the custom are grantable for life on'y.

(3) What follows in this Section is

neither in L. & M.—Roh.—nor P.—The addition first appears in Redm.

(4) [See Note 408.]

Chap. 10.

Tenant per le Verge.

Sect. 78.

TENANTS per le verge sont en tiel nature come tenants per le copy de court roll. Mes la cause pur que ils sont appellees tenants per le verge, est, pur ceo que quant ils voilent surrender leur tenements en le main leur seignior al use d'un auter, ils averont un petite verge (per le custome) en leur main, le quel ils baileront al seneschall ou al bailife solonque le custome et use del manor, et celui que avera la terre prendra mesme la terre en le court, et son prisel serra enter en le roll, et le seneschall ou le bailife solonque le custome delivra a celui que prist la terre mesme le verge, ou un auter verge, en nosme del seisin; et pur cel cause ils sont appellees tenants per le verge, mes ils n'ont auter evidence sinon per copy de court roll.

TENANTS by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge, is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custome) in their hand, the which they shall deliver to the steward or to the bailife according to the custome of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entred upon the roll, and the steward or bailife according to the custome shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.

“**T**ENANTS per le verge.” This tenant per le verge is a meere copiholder, and taketh his name of the ceremony of the verge (2). Tenure in villenage, or by base tenure, is thus described by Britton: [a] *Villenage est tenure de demeines de chescun seigneur baille, a tener a son volunt per villeines services de enprover al opes le seignior, et li vere per verge et nient per title de escrit, ne per succession de heritage, dont gards de mariage ne auters services reals, come homage et relieves, ne poient des amones de demeines ne de villenage este demand.*

14. H. 4. 33.
(Cro. Cha. 597.)

[a] Britton,
fol. 165. a.
F. N. B. fol. 12.
Liberatio per
Virgam.

“*A le seneschal*” (which we call a steward). *Seneschallus* is derived of *sein*, a house or place, and *schalc*, an officer or governor. Some say that *sen* is an ancient word for justice, so as *seneschall* should signifie *officiarius justitiæ*; and some say that steward is derived of *stewe* (that is) a place, and *ward*, that signifieth a keeper, warden, or governor; and others, that it is derived of *stede*, that signifieth a place also, and *ward*, as it were the keeper or governor of that place. But it is a word of many significations. In this place it signifieth an officer of justice, viz. a keeper of courts, &c. *Fleta* describeth the office and duty of this officer at large most excellently: *Provideat sibi dominus de seneschallo circumspecto et fideli, viro provido et discreto et gratioso, humili, pudico, pacifico, et modesto, qui in legibus consuetudinibusque provincie et officio seneschalciæ se cognoscat, et jura domini sui in omnibus teneri affectet, quique subballivos domini in suis erroribus et ambiguis sciatur instruere et docere, quique egenis parcere,*

Vide Sect. 92.
& 379. *Fleta*,
lib. 2. cap. 66.
Vide statut. de
extent. maner.
14. E. 1.

et

Lib. 1. Cap. 10. Of Tenant per le Verge. Sect. 79.

et qui nec prece vel pretio velit à tramite justitiæ deviare, et perversè judicare; cujus officium est curias tenere maneriorum; et de subtractionibus consuetudinem, servitiorum, reddituum, sectarum ad cur', mercata, molendina domini et ad visus francpledg' aliarumque libertatum domino pertinentium inquirat, &c. The residue pertaining to his office is worth your reading at large. Every steward of courts is either by deed or without deed (1); for a man may be retained a steward to keepe his court baron and leet also belonging to the mannor without deed, and that reteyner shall continue untill he be discharged. The lord of a mannor may make admittances out of court and out of the mannor also (2), as at large appeareth in my Reports.

Vide 4. Co.
Cases de Copi-
holds, fo. 26,
27. 30.

Sect. 79.

ET auxy en divers seignories et manors il y ad tiel custome, si tiel tenant, que tient per custome, voloit aliener ses terres ou tenements, il poit surrender ses tenements a le bailly, ou a le reeve, ou a deux probes homes del seignory, al use cestuy que avera le terre, d'aver en fee simple, fee taile, ou pur terme de vie, &c. Et tout ceo ils presenteront al procheine court, et donque celuy, que avera la terre per copy de court roll, avera mesme la terre selonque l'entent del surrender.

AND also in divers lordshippes and manors there is this custome, viz. if such a tenant, which holdeth by custome, will alien his lands or tenements, he may surrender his tenements to the bailife, or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life, &c. And they shall present all this at the next court, and then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

Vide Lamb. ex-
position of Saxon
words.

“**A** Le bailie.” This word *bailie*, as some say, commeth of the French word *baylife*, in Latin *ballivus*; but in truth bailie is an old Saxon word, and signifieth a safe keeper or protector, and *baile* or *ballium* is safe keeping or protection: and thereupon we say, when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison: and the sherife that hath *custodiam comitatûs* is called *ballivus*, and the county *balliva sua*.

Fleta, lib. 2.
ca. 67. & 69.

“*Reve*” is derived of the Saxon word *gerefa* or *gereve*; and by contraction or rather corruption *greve*, or *reve*, and is in Latin *præfectus* or *præpositus*. It signifies as much as *appruator*, a disposer or director, as wood-reeve, sheepe reve, shire reeve, &c. whereof more shall be said hereafter. Vide *Fleta*, lib. 2. cap. 67. where he treateth of the office of the bailife, and cap. 69. *de officio præpositi*, of the office of the reeve, and what belongeth of duty and right to either of them, which words are too long here to be inserted. Only this I will take out of him. *Ballivus autem cujuscunque manerii esse debet in verbo verax, et in opere diligens et fidelis, ac pro discreto appruatore cognitus plegiatus et electus, qui de communioribus legibus pro tanto*

[62. a.]

(1) [See Note 410.]

(2) See ante 59. a. and note 6. there.

tanto officio sufficient' se cognoscat, et quòd sit ita justus, quòd ob vindictam seu cupiditatem non quærat versus tenentes domini nec alios, &c. Præpositus autem tanquam approuator et cultor optimus, &c. domino vel ejus seneschallo palam debet præsentari, cui injungatur officium illud indilatè. Non ergo sit piger aut somnolentus. sed efficaciter et continuè commodum domini adipisci nitatur et exarare, &c. the residue concerning both the offices being worthy your reading.

“ *A le bailie ou le reeve.*” Littleton intendeth into the hands of the lord by the hands of the bailiffe or the reeve.

“ *Ou al deux probes homes del seigniorie.*” The custome doth guide these surrenders out of court, and the custome must be pursued.

Vid. 4. Co. 25.
Kite and Quaintin's case.

“ *Et tout ceo ils presenteront al procheine court, &c.*” By the surrender out of court, the copihold estate passeth to the lord under a secret condition, that it be presented at the next court according to the custome of the mannor. And therefore if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good (1); and if it be presented at the next court, *Ce' que use* shall be admitted thereunto; but if it be not presented at the next court according to the custome, then the surrender becometh void (2); and so was it cleerly holden *Pasch. 14. Eliz.* in the court of common pleas, which I my selfe heard. (4. Co. 29. b.)

Sect. 80.

ET issint est asçavoir, que en divers seignories, et divers manors, sont plusors et divers customes en tielx cases, quant a prender tenements, et quant a pleder, et quant as auters choses et customes a faire; et tout ceo que n'est pas encounter reason poit bien estre admitte et allow.

AND so it is to be understood, that in divers lordships, and in divers mannors, there be many and divers customes in such cases, as to take tenements, and as to plead, and as to other things and customes to be done; and whatsoever is not against reason may well be admitted and allowed.

“ *SONT plusors et divers customes.*” This was cautiously set downe, for in respect of the variety of the customes in most mannors, it is not possible to set down any certainty, only this incident inseparable every custome must have, viz. that it be consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law.

(4. Co. 31.
Cro. Cha. 220.)

“ *Enconter reason.*” This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio.*

(1) [See Note 411.]

(2) See further as to the time of present-

ing surrenders, Vin. Abr. *Copyhold*, U. a. Com. Dig. *Copyhold*, F. 10.

Sect. 81.

ET tiels tenants que teignent solonque la custome d'un seigniorie ou d'un manor, coment que ils ont estate d'enheritance solonque le custome del seigniorie ou manor, uncore pur ceo que ils n'ont ascun franktenement per le cours del common ley, ils sont appellees tenants per base tenure.

AND these tenants which hold according to the custome of a lordship or manor, albeit they have an estate of inheritance according to the custome of the lordship or manor, yet because they have no freehold by the course of the common law, they are called tenants by base tenure.

[62. b.]

“ Ils sont appellees tenants per base tenure.” Of this sufficient hath been spoken before.

Sect. 82.

ET divers diversities y sont perenter tenant a volunt, que est eins per lease son lessor per le course del common ley, et tenant solonque le custome del manor en le forme avantdit. Car tenant a volunt solonque custom puit aver estate d'enheritance (come est avantdit) al volunt le seignior, solonque le custome et usage del manor. Mes si home ad terres ou tenements, queux ne sont deins tiel manor ou seigniorie ou tiel custome ad este use en le forme avantdit, et voile lessor tiels terres ou tenements a un auter, a aver et tener a luy et a ses heires a le volunt le lessor, ceux parolx (a les heires de le lessee) sont voids. Car en cest case si le lessee devie, et son heire enter, le lessor avera bon action de trespas envers luy; mes nemy issint envers l'heire le tenant per le custome en ascun cas, &c. pur ceo que le custome de le manor en ascun cas luy puit aide de barrer son seignior en action de trespasse, &c.

AND there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law, and tenant according to the custome of the manor in forme aforesaid. For tenant at will according to the custome may have an estate of inheritance (as is aforesaid) at the will of the lord, according to the custome and usage of the manor. But if a man hath lands or tenements, which be not within such a manor or lordship where such a custome hath beene used in forme aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heires at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heire enter, the lessor shall have a good action of trespasse against him; but not so against the heire of tenant by the custome in any case, &c. for that the custome of the manor in some case may aid him to barre his lord in an action of trespasse, &c.

“ **T**ENANT a volunt solonque le custom puit aver estate d'enheritance, &c.” Here note that *Littleton* alloweth, that by the custome of the manor the copiholder hath an inheritance, and consequently the lord cannot put him out without cause.

“ M

“ *Mes si home, &c. voile leffer terres ou tenements a un auter a aver et tener a luy et ses heires a volunt le lessor, ceux parols (a les heires de le lessee) sont voides. Car en cest case si le lessee devie, et son heire enter, le lessor avera action de trespassse envers luy, &c.*” By which it is proved, that by the death of the lessee the lease is absolutely determined; which is proved by this, that if the heire enter the lessor shall have an action of trespassse, *quare vi et armis*, before any entry made by the lessor.

10. E. 4. 18.

22. E. 4. 13.

2. R. 2. barre

237.

11. H. 7. 22.

21. H. 7. 12.

63. a.]

“ *Pur ceo que le custome de le manor en ascun case luy puit aider de barrer son seignior en action de trespassse, &c.*” Hereby it appeareth, that by the opinion of Littleton the lord against the custome of the manor cannot oust the copiholder.

Sect. 83.

ITEM, l'un tenant per le custome en ascuns lieux doit repaier et susteiner ses measons, et l'auter tenant a volunt nemy.

ALSO, the one tenant by the custome in some places ought to repaire and uphold his houses, and the other tenant at will ought not.

“ **P**ER le custome.” For what a copiholder may or ought to doe, or not doe, the custome of the manor [a] must direct it, for *consuetudo manerii est observanda*. [b] But if there be no custome to the contrary, wast either permissive (1) or voluntary of a copiholder is a forfeiture of his copihold (2).

[a] Bracton, lib. 2. fol. 76.

[b] Vid. 4. Co. 21, 22. &c. in Cases de Copiholds.

Sect. 84.

ITEM, l'un tenant per le custome ferra fealtie, et l'auter nemy. Et plusors auters diversities y sont perenter eux.

ALSO, the one tenant by the custome shall do fealty, and the other not. And many other diversities there be betweene them.

“ **L'**UN tenant per le custome ferra fealtie, et l'auter nemy.” And the doing of fealty by a copiholder, proveth that a copiholder, so long as he observes the custome of the manor and payeth his services, hath a fixed estate. For tenant at will, that may be put out at pleasure, shall not doe fealty. For to what end should a man sweare to be faithfull and true to his lord, and should beare faith to him which he claimeth to hold of him, and that lawfully he shall doe his customes and services, &c. when he hath no certaine estate, but may be put out at the pleasure of the lessor, or he himselfe may determine it at his pleasure. Of these kind of customary tenants, and of many things concerning them, you may read more in the Fourth

Vide Sect. 132.

(Post. 93. b.)

Booke

(1) [See Note 412.]

(2) [See Note 413.]

Lib. I. Cap. 10. Of Tenant per le Verge. Sect. 84.

4. Co. 21, 22, Booke of my Reports, fol. 21, 22, 23, &c. Thus much, as I have here set downe, may suffice, for the understanding of such cases and opinions as *Littleton* hath expressed (3).

Finis Libri Primi.

(3) See further on the subject of *copyhold* estates *Kitchin on Courts*, *Coke's Copyholder and the Supplement*, the book intituled the *Surveior's Dialogue*, *Calthorp's reading on Lord and Copyholder*, *Hughes on Original Writs* 247. to 259. the title *Copyhold* in the *Abridgments*, the *Lex Cusumaria*, and the several other treatises on *copyhold* law, particularly those by *Shepherd* and *Nelson*.

THE
SECOND BOOK
OF THE
FIRST PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

CHAP. I.

Homage.

Sect. 85.

HOMAGE est le plus honorable service, et plus humble service de reverence, que franktenant puit faire a son seignior. Car quant le tenant ferra homage a son seignior, il ferra discinēt, et son test discover, et son seignior seera, et le tenant genulera devant luy sur ambideux gennes, et tiendra ses maines extendes et joyntes ensemble enter les maines le seignior, et issint dirra: Jeo deveigne vostre home (1) de cest jour en avant de vie et de member, et de terrene honor (2), et a vous ferra foiall et loiall, et foy a vous portera des tenements que jeo clame de tener de vous, salve la foy que jeo doy a nostre seignior le roy; et donques le seignior issint seyant luy basera.

HOMAGE is the most honorable service, and most humble service of reverence, that a franktenant may do to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shal kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and shall say thus: I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall be true and faithfull, and beare to you faith for the tenements that I clame to hold of you, saving the faith that I owe unto our soveraigne lord the king; and then the lord so sitting shall kisse him (3).

OUR author having taught us in his former booke the several distinct estates of lands and tenements as most necessary to be knownen, for the understanding of these two other bookes, doth in this second book treat of the tenures (1) and services whereby the said lands

(1) [See Note 1.]

[64. b.]

(1) [See Note 2.]

(2) The words *de vie et membre et de terrene honor* are not in L. and M. but the

Roh. and subsequent editions have them.

(3) Vid. in Rot. Parl. 18. H. 6. n. 58. a special act of parliament to excuse the kissing in the case of homage made to the king by reason of pestilence. Hal. MSS.

(4. Co. 8. a.
Bevil's case.)

lands and tenements be holden ; which he divideth into twelve parts, viz. *Homage, Fealty, Escuage, Knight Service, Socage, Frankalmoigne, Homage Auncestrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage*, and into *Rents*. Wherein his method is most excellent ; for he beginneth with *Homage*, because it is the most humble service of reverence, expressing the duty of the tenant to his lord, and the affectionate love and protection of the lord towards his tenant, as hereafter shall appeare. Secondly, *Fealty*, a sacred service, expressing by oath his fidelity to his lord.

Thirdly, *Escuage*, which is *servitium scuti*, the service of the shield. [64. b.]

Fourthly, *Knights service*, for the defence of the realme against outward hostility and invasions, which the better might be effected, if such duty fidelity and love were betweene lords and tenants, as ought to be, and as the law expecteth.

Fifthly, *Socage*, the service of the plough, aptly placed next knights service, for that the ploughman maketh the best fouldier, as shall appeare in his proper place.

Sixtly, *Frankalmoigne*, service due to Almighty God, placed towards the middest for two causes: first, for that the middest is the most worthy and most honourable place: and secondly, because the first five preceding tenures and services, and the other six subsequent, must all become prosperous and usefull, by reason of God's true religion and service ; for *Nunquam prosperè succedunt res humanæ, ubi negliguntur divinæ*. Wherein I would have our student follow the advice given in these ancient verses, for the good spending of the day:

Sex horas somno, totidem des legibus æquis.

Quatuor orabis, des epulisque duas.

Quod superest ultrò sacris largire camænis.

Seventhly, *Homage auncestrell*, ancient families enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8. and 9. *Serjeanty grand et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverence of all kinde is due ; which hath two notable effects. First, *imperii majestas est tutelæ salus*, according to the old rule ; and secondly, it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the Chapter before.

10. Then followeth the tenure of *Burgage*, of ancient burghes and cities, &c. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all commonwealths, especially of islands.

11. *Villenage*, for the performance of service, yet necessary service for the cleansing of cities, boroughes, mannors, &c. and for the better manuring of arable grounds, and increase of husbandry.

12. And lastly, tenure by *rents*, which are called *vivi redditus*, because the lords and owners thereof do live by them ; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and saleable at a reasonable value. And now understanding his method, let us peruse our author's words.

And

And as our author beganne his first booke with fee simple, which is the most principall and worthiest estate, so he beginneth his second booke with homage, which is the most honourable and humble service.

“Homage” is derived of [a] *homo*; and it is called *homage*, because when he doth this service, he saith, *Jeo deveigne vostre home*. And in English homage is called manhood, so as the manhood of his tenant and the homage of his tenant is all one. *Mutua quidem debet esse domini et homagii fidelitatis connexio, ita quod quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam.*

[a] Glanvil.
li. 9. ca. 1.
Bract. fo. 78. 30.
Brit. fo. 170.
172, 173.
Flet. li. 3. c. 16.
Mir. c. 3. de
Homage, et l. 5.
sect. 1.

“Foyal et loyal.” These words are of great extent, for they extend to the observation of the lord’s counsell in whatsoever is honest and profitable. [b] *Omnis homo debet fidem domino suo de vitâ et membris suis, et terreno honore, et observatione consilii sui per honestum et utile* (comprehended under these words *foyal et loyal*) *salvâ fide Deo et terræ principi.*

[b] Lib. Rub.
ca. 55.

[65. a.] “Service.” [c] *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes dominis suis debetur ratione feodi sui.* But *servitium est duplex; spirituale*, whereof more shall be said in the Chapter of Frankalmoigne; *et temporale*, whereof our author here treateth. And he beginneth with homage, first, because it is most honourable, for *honor plus est in honorante, quàm in honorato.* 2. It is *pluis humble de reverence*, and both of these for five causes on the part of the tenant. First, the tenant when he doth his homage is *discinctus*, disarmed or unguarded. Secondly, *nudo capite*, bare-headed. Thirdly, *ad pedes domini super genua projectus*. Fourthly, *ambas manus junctas inter manus domini porrigit*. Fifthly, *per verba omni supplici veneratione plena*, he saith, *Jeo deveigne vostre home, &c.* And for three causes on the part of the lord. First, the lord doth sit. Secondly, he incloseth his tenants hands betweene his owne. Thirdly, the lord sitting kisseth the tenant. Prudent antiquity did, for the more solemnity and better memory and observation of that which is to bee done, expresse substances under ceremonies.

[c] 2. H. 4. 6.

Glanvil. et Mir.
ubi supra.

Nil sine prudenti fecit ratione vetustas.

“*Jeo deveigne vostre home de vie et de member.*” And therefore he is *discinctus*, for that he must never be armed against, or opposite to his lord, but both life and member must be ready for the lawfull defence of his lord.

Bract. fol. 80.
Britton,
fol. 173. b.
ac. Fleta, lib. 3.
cap. 16.

2. “*De terrene honor.*” Expressed by kneeling at the feet of his lord.

3. *Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio defensio et warrantia, et ex parte tenentis reverentia et subiectio.* So as the holding up of the tenant’s hands betokeneth reverence and subjection, and the lord’s inclosing of his tenant’s hands between his own betokeneth protection and defence.

Bract. ubi supra.
Brit. fol. 174.

4. “*Et a vous serra foyal et loyal, et foy a vous portera, &c.*” This faith, *fides*, or *fœdus perpetuum*, this perpetuall league between the lord and the tenant is expressed by the lord’s kissing of the tenant. And some say, that *fœdus dicitur à fide, quia fides interponitur*. And so firme and strong was this league betweene them, that by the ancient law of England, *nihil facere potest tenens propter obligationem homagii, quod vertatur domino ad exhæredationem, vel aliam atrocem injuriam. Nec dominus tenenti è converso. Quod si fecerint, dissolvitur et extinguatur homagium omnino et homagii connexio et obligatio, et erit inde justum judicium cum venerit contra homagium et fidelitatis sacramentum, quod in eo in quo delinquant puniantur, s. in personâ domini, quod amittat dominium, et in personâ tenentis, quod amittat tene-mentum.*

[a] Brit. ubi
supra.
Bract. ubi supra.
Glanvil. lib. 9.
cap. 1.
Mir. cap. 3. de
Homage.

“*Des tenements queux jeo claime a tener de vous.*” Britton faith, that [a] in doing of homage he must name the lands or tenements for which he doth homage in certaintie; and the reason is, *ne in captionem homagii contingat dominum per negligentiam decipi vel per errorem.*

For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in England in the hands of any subject (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before (1).

[b] 18. E. 3. 35.
44. E. 3. 5.
48. E. 3. 9.
8. H. 7. 12.

Secondly, all the lands [b] within this realme were originally derived from the crowne, and therefore the king is soveraigne lord, or lord paramount, either mediate or immediate of all and every parcel of land within the realme (2).

Thirdly, that in ancient time lords upon the creation of their tenures did not onely reserve rents, services, and profit, &c. for which they might distreine and have other remedy; but also tooke an humble submission of his tenant by promise and oath (for to homage fealty is incident), to be true and faithfull to him for the tenements holden of him, which submission is called homage and fealty, according to the tenure reserved.

Glanvil. lib. 9.
c. 1.
Mir. c. 3. de
Fealty.
Bract. ubi supr.
Brit. ubi supra.
Inter Inquis.
apud Lanceson.
anno 6. E. 1.
Cornub. in Thef.

“*Salve le foy que jeo doy a nostre seignior le roy.*” Both because there is *homagium ligeum*, which is due to the king onely, and also because he is soveraigne lord over all (3).

I have seene an ancient record in Anno 6. Edw. 1. in these words. *Michael de North, qui sequitur pro rege, queritur, quod cum dominus rex ratione regie dignitatis et coronæ suæ tale habeat privilegium quod nullus in regno suo de aliquo qui sit in regno Angliæ alicui homagium facere debeat, vel aliquis hujusmodi homagium ab aliquo recipere debeat, nisi factâ mentione de homagio domino regi debito eidem domino regi fideliter observand’ Walterius Exon’ episcopus, in contemptu domini regis, et ad manifestam quoad privilegium prædictum ipsius domini regis exhæredationem, et ad damnum et dedecus ipsius domini regis ad valentiam decem mill’ librarum, de Henrico de Pomeray, Thomâ de Kane’, Johanne de Bello Prato, Laurentio filio Ric’ Johanne le Soer, Willielmo de Alex’, Eudone de Tranael, Rogero le Gros, Johanne le Lunge, Rado’ de Bevill, Guidone Novant, Willielmo de Roufkerrek, et Hen. Cannel, accepit ser-*

[65. b.]

(1) [See Note 3.]

(3) [See Note 4.]

(2) See ante fol. 64. a. note 1. and fol. 1.

b. note 1.

vitia contra privilegium prædict', nullâ factâ mentione de homagio et fidelitate domino regi debitis. And judgement in the end was given against the said bishop.

"Roy." Our ancestors the Saxons termed him *Coning* or *Cyning*, a name signifying power and skill, which by way of contraction we now call King. This name the Saxons with a small alteration had from the *Brittaines*, who called him *Koningb* or *Konincke*. In *French* he is called *Roy*, in *Italian* *Re*, in *Spanish* *Rey*, all derived from the *Latine* (*Rex*), of the true signification whereof you shall read [d] plentiful matter in our old bookes.

So as homage is divided, first, in *homagium ligeum, et non ligeum* (1).

Second, in *homagium antecessorium, et non antecessorium* (2). It is here necessary to be knowne what tenant, that holdeth by homage, shall do homage. [e] *Item videndum, quis potest homagium facere. Sciendum est, quod quilibet liber homo, tam masculus quam femina, clericus et laicus, major et minor; dum tamen electi in episcopos post consecrationem homagium non faciant, quicquid fecerint ante, sed tantum fidelitatem* (3). *Conventus autem homagium non faciet de jure, sicut nec abbas, nec prior, eò quod tenent nomine alieno, scilicet nomine ecclesiarum.*

[g] One within the age of 21 yeares may doe homage; but *Bracton* saith he cannot doe fealtie, because in doing of fealty he ought to be sworne, which an infant cannot be (4). But some opinions be in our bookes to the contrary, viz. that an infant shall doe fealtie; but I take it to be meant of homage, and herewith [b] agreeth *Britton*, who saith, *et tout soit que enfant deins age fait homage, pur ceo ne volons nous my que il face serement de fealtie, j'esque a taunt que il soit de pleine age; et tout soit ceo comon dit del people que fait de enfant fait deins age ne soit fait my a tener estable. Volons neque dent, que chescun home et chescun feme, de quel age que ils soient, facent homage a leur seignour solonque l'estatut de la grand charter.*

Glanvill saith, [i] women shall not do homage; but *Littleton* saith that a woman shall doe homage, but she shall not say, *Jeo deveigne vostre feme*, but *Jeo face à vous homage*; and so is *Glanvill* to be understood, that she shall not doe compleate homage.

33. H. 6. 16. 20. E. 3. per quæ servic. 24. [b] *Britton*, fol. 171. [i] *Glanvil*. lib. 9. c. 1. F. N. B. 157. Regist. 296. *Britton*, ubi supra. *Mirror*, ca. 1. sect. 3.

[d] *Mirror*, ca. 1. sect. 2. and ca. 2. sect. 1. and 2. *Bract.* fo. 5. 107. 368, 369. 340. *Fleta*, lib. 1. cap. 5. *Fortescue*, cap. 8. and 37. *Stanf.* pl. cor. 98, 99. and *Præf.* 65.

[e] *Glanvil*. lib. 9. ca. 1. *Bracton*, fol. 78. b. *Britt.* c. 68. fo. 170, 171. *Fleta*, lib. 3. cap. 16. [g] *Glanvil*. lib. 9. cap. 1. *Bracton*, lib. 2. 78. *Fleta*, lib. 3. cap. 16. acc. 21. E. 3. 40. 24. E. 3. 63, 64. 32. E. 3. age 80. & tit. per quæ servit. 9. 13. H. 4. 5.

Sect. 86.

MES si un abbe, ou un pryor, ou auter home de religion, ferra homage a son seignior, il ne dirra, *Jeo deveigne vostre home*, &c. pur ceo que il ad luy professe pur estre tantsolement le home de Dieu. Mes il dirra issint : *Jeo*

BUT if an abbot, or a pryor, or other man of religion, shall doe homage to his lord, he shall not say, I become your man, &c. for that he hath professed himselfe to be onely the man of God. But he shall say thus: I doe

(1) See note 3. in 65. a.

(2) That is, *auncesfrel* and not *auncesfrel*, as to which see post. 109. b.

(3) Homage done the king by a bishop

salvo suo ordine. *M. Paris* 101. *Hal.* MSS. —See what is said by lord Coke *infra*.

(4) [See Note 5.]

Jeo vous face homage, et a vous serra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, salve la foy que jeo doy a nostre seignior le roy.

I doe homage unto you, and to you I shall be true and faithfull, and faith to you beare for the tenements which I hold of you, saving the faith which I doe owe unto our lord the king.

[k] Glanvil.
lib. 1. cap. 9. in
fine. Britton,
lib. 2. 78.
Bracton, cap. 68.
Fleta, lib. 3.
ca. 16.
[l] Vid. Sect.
96. & 133.

NO man of religion when [k] he doth homage shall say, *Jeo deveigne vostre home*; because he hath professed himselfe the man of God; yet shall he doe homage, and shall say, [l] *Jeo face a vous homage, et a vous serra foyall et loiall, &c.* And note, that here religion is taken largely, for it extends not only to regular persons, as abbots and the like, but also to all ecclesiasticall persons, as bishops, deanes, or any other sole ecclesiasticall body politike; and so it is the use at this day, which also appeares in our old books.

And it is to be observed, that in old bookes and records, the homage which a bishop, abbot, or other man of religion doth, is called fealty, for that it wanteth these words (*Jeo deveigne vostre home.*) But yet in judgement of law it is homage, because he saith, I doe you homage, &c. and so of a woman.

Sect. 87.

[66. a.]

ITEM, *si feme sole ferra homage a son seignior, el ne dirra, Jeo deveigne vostre feme; pur ceo que n'est convenient que feme dirra, que il deviendra feme a ascun home, forsque a sa baron, quant el est espouse. Mes el dirra, Jeo face a vous homage, et a vous serra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, salve la foy que jeo doy a nostre seignior le roy.*

ALSO, if a woman sole shall doe homage, she shal not say, I become your woman; for it is not fitting that a woman should say, that she will become a woman to any man, but to her husband, when she is married. But she shall say, I do to you homage, and to you shall be faithfull and true, and faith to you shall bear for the tenements I hold of you, saving the faith I owe to our soveraigne lord the king.

[m] For like
reasons ab in-
convenienti,
vid. Sect. 138,
139. 231. 269.
440. 478. 665. 722 730.

“*Pur ceo que n'est convenient, &c.*” By this it appeareth, [m] that *argumentum ab inconvenienti plurimum valet in lege*, as often shall be observed hereafter. *Non solum quod licet sed quid est conveniens est considerandum. Nihil quod est inconveniens, est licitum* (1).

21. H. 7. 13. F. N. B. 230. d. 16. H. 7. 9.

Sect. 88. (2)

ITEM, *home puit veier un bone note en M. 15. E. 3. lou un home et sa feme fierent homage et fealty en le common*

ALSO, a man may see a good note in M. 15. E. 3. where a man and his wife did homage and fealtie

(1) [See Note 6.]

(2) In the Rohan edition, and in those

of Pynson and Redman, this Section is transposed to the Chapter of Fealty.

common banke, quel est escrie en tiel forme. Nota, que I. Leukner et Elizabeth sa feme fierent homage a W. Thorpe en cest maner : l'un et l'auter tiendront jointment leur mains enter les mains W. T. et le baron dit en cest forme : Nous vous ferromus homage, et foy a vous porterons pur les tenemens que nous teignomus de A. votre conusor, que a vous ad graunt nostre services en B. et C. et auters villes, &c. encountre tous gents, salve la foy que nous devons a nostre seignior le roy, et a ses heires, et a nostre auters seigniors : et l'un et l'auter luy baseront. Et puis ils fierent fealtie, et l'un et l'auter tyendront leur mains sur un livre, et le baron dit les parolx, et ambideux baseront le livre.

fealtie in the common place, which is written in this forme. Note, that *I. Lewkner* and *Eliz.* his wife did homage to *W. Thorpe* in this manner : the one and the other held their hands joynntly betweene the hands of *W. T.* and the husband aith in this forme : We doe to you homage, and faith to you shall beare for the tenements which we hold of *A.* your conusor, who hath granted to you our services in *B.* and *C.* and other townes, &c. against all nations (3), saving the faith which we owe to our lord the king, and to his heires, and to our other lords, and both the one and the other kissed him. And after they did fealtie, and both of them hold their hands upon the booke, and the husband said the words, and both kissed the booke.

IN this [n] record three things are to be observed.

1. How necessary and profitable records and observations are, albeit they were not published in print ; for at the time when *Littleton* wrote, this record was not printed.

2. That the husband and wife doing homage, the husband shall speake the words for them both, viz. We doe to you homage, &c.

3. That the homage which the husband and wife doe, is the very homage which the wife should doe alone. But this joint homage, done by the husband and wife, is intended to be before issue had between them, whereof more shall be sayd hereafter. And it is to be observed, that very few cases ruled or resolved in the reigne of *Edward* the third, but the same or the like had been ruled or resolved in the raignes of *Edward* the second, *Edward* the first, or before, as for example for warrant hereof, *vide* Hill. 17. E. 2. Rot. Parl. &c.

[n] Mich.
15. E. 3. tit.
Avowrie 109.

Hill. 17. E. 2.
Rot. Parl. &c.

Sect. 89.

NOTA, si un home ad severall tenancies, queux il tient de severall seigniors, scilicet, chescun tenancy per homage ; donque quant il fait homage a un des seigniors, il dirra en le fine de son homage fait, Salve la foy que jeo doy a nostre seignior le roy, et a mes auters seigniors (1).

NOTE, if a man hath severall tenancies, which he holdeth of severall lords, that is to say, every tenancy by homage ; then when he doth homage to one of his lords, he shall say in the end of his homage done, Saving the faith which I owe to our lord the king, and to my other lords.

(3) [See Note 7.]

(1) [See Note 8.]

“ *Et a mes auters seigniours.*” This saving for other lords is good for explanation, albeit the homage is referred onely to the tenements which he holdeth of him to whom he doth the homage.

Sect. 90.

NOTA, que nul ferra homage mes tiel que ad estate en fee simple, ou en fee taile, et son droit demesne, ou en droit d'un auter. Car il est un maxime en ley, que il que ad estate forsque pur terme de vie, ne ferra homage, ne prendra homage. Car si feme ad terres ou tenements en fee simple, ou en fee taile, queux il tient de son seignior per homage, et prent baron, et ont issue, donque le baron en la vie la feme ferra homage (2), pur ceo que il ad title d'aver les tenements per le curtesie d'Engleterre s'il survesquist la feme, et auxy il tient en droit de sa feme. Mes si la feme devy devant homage fait per le baron en la vie sa feme, et le baron soy tient eins come tenant per le curtesie, donques il ne ferra homage a son seignior, pur ceo que il adonque n'ad estate forsque pur terme de vie.

Plus ferra dit de homage en le tenure per homage auncesrel.

NOTE, none shal do homage but such as have an estate in fee simple, or fee taile, in his owne right, or in the right of another. For it is a maxime in law, that he which hath an estate but for terme of life, shal neither doe homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee taile, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife shal doe homage, because he hath title to have the tenements by the curtesie of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himselfe in as tenant by the curtesie, then he shal not doe homage to his lord, because he then hath an estate but for terme of life.

More shali be said of homage in the tenure of homage ancestrell.

“ **E**N droit d'un auter.” As the husband and wife in the right of his wife, the bishop in right of his bishopricke, &c. the abbot or prior in right of his monastery, &c. But no corporation aggregate of many persons capable, [p] be the same ecclesiasticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and such like, albeit they be seised in fee of lands holden by homage, yet shal not they doe homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appeare in person; for albeit the bodies naturall, whereupon the bodie politique consists, may be seene, yet the bodie politique or corporate itselfe cannot be seene, nor doe any act but by attorney, and homage must ever be done in person, &c. (3) And albeit an abbot and covent is a corporation aggregate of many, yet because the covent are all dead persons in law, the abbot alone in nature of a sole corporation shal doe homage.

[67. a.]

[p] 33. H. 8. tit.
Fealtie Br. 15.
4. Co. 11.
7. Co. 10.
10. Co. 31.

(2) [See Note 9.]

(3) 2. E. 3. 10. Accord. Hal. MSS.

“ *Un maxime en ley.*” A maxime is a proposition, to be of all men confessed and granted without prooffe, argument, or discourse. *Contra negantem principia non est disputandum.* But of this somewhat hath beene said before.

“ *Il que ad estate forsque pur terme de vie.*” [g] A parson or vicar of a church, that hath a qualified fee, [r] and yet to many intents upon the matter but an estate for life, can neither receive (1) homage nor do homage, as a bishop, an abbot, or any such like, that hath a fee absolute, may. [/] So if a man and his wife be seised in fee of a feignorie in the right of his wife, the husband shall not receive homage alone, but he and his wife together. [t] But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his wife; and the reason is, because he by having of issue is intituled to an estate for terme of his owne life, in his owne right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But if his wife dye, then he hath onely but an estate for life, and then he cannot receive homage. Yet tenant for life or years of a feignory [u] shall have ward, mariage, and reliefe, and shall suppose that the tenant died in the fealty of the pl. [x] *Fieri possunt homagia libero homini tam masculo quam femine, tam majori quam minori, tam clerico quam laico.*

43. E. 3. 13. 44. E. 3. 41. 3. E. 3. Avowrie 175. 13. E. 3. 2. gard. 39. 22. E. 3. fol. 19. gard. 44. [u] 6. E. 2. gard. 122. 13. E. 3. gard. 39. 22. E. 3. gard. 44. [x] Glanvil. lib. 9. cap. 3. 18. E. 3. 7. 43. E. 3. 13. 44. E. 3. 41. 13. H. 6. Avowrie 21. 8. H. 6. 13. 7. E. 4. 27. F. N. B. 257.

[g] Glanvil. lib. 9. cap. 2. Britton, fol. 170. Temps E. 1. tit. Juris utrum, 13. (Post. 341. b.) [r] 8. E. 4. 28. 39. E. 3. 15. 3. E. 3. Avowrie 175. [/] 2. E. 2. Avowrie 183. F. N. B. 257. 13. E. 3. gard. 39. [t] 27. Aff. p. 51. F. N. B. 257. 13. H. 6. Avowrie 21.

“ *Et ount issue, douque le baron en la vie la feme ferra homage.*” The reason hereof is rendred before, and also that after the death of his wife he being but a bare tenant for life shall doe no homage; for regularly it is true, that he that cannot receive homage in respect of the weaknesse of his estate in the feignory, shall not doe homage, if he hath a like estate in the tenancy.

If a man hold of the king, and hath issue divers daughters, and dyeth, the king shall have homage of every one of these daughters. And this [a] appeareth by the statute *De Hibernia anno 14. H. 3.* to be the common law; for that act saith, *In regno nostro Angliæ talis est lex et consuetudo, quod si quis tenuerit de nobis in capite, et habuerit filias hæredes, ipso patre defuncto, antecessores nostri habuerunt et semper nos habuimus et cepimus homagium de omnibus hujusmodi filiabus, et singulæ earum tenerent de nobis in capite in hoc casu.* And therefore where by the [b] statute *De Prærogativa Regis*, it is provided, *Si una hæreditas, &c.* that is but an affirmance of the common law [c] But this is to be understood where the coheirs be of full age; for if they be within age and in ward to the king, *Primogenita tantum faciet homagium pro se et sororibus suis, et aliæ sorores, cum ad ætatem pervenerint, facient servitia dominis feodorum per manum primogenitæ.* [d] And therefore if a man hold of a common person by the service of homage, and hath issue divers daughters and dyeth, the eldest daughter onely shall doe homage for her and all her sisters. And this appeareth also by the statute of *Hibernia. Primogenita tantum faciet homagium domino pro se et omnibus sororibus suis.* And the reason is there rendred afterward, *Quia omnes sorores sunt quasi unus hæres de unâ hæreditate.*

[a] 14. H. 3. tit. Prærog. 5.

[b] Prærog. Regis cap. 5. [c] Statut. de homagio capiendo Temps E. 1. (2) [d] Glanvil. lib. 7. cap. 3. & lib. 9. cap. 2. Braët. lib. 1. de homagio capiendo, & lib. 2. fo. 78. 80. Britton, fol. 168. b. 171, 172. Fleta, lib. 3. cap. 16 & lib. 2. (Post. 164. b.)

ca. 60. & lib. 5. cap. 9. F. N. B. 161. 150. 259. Stanf. prærog. 23, 24.

(1) [See Note 10.]

(2) [See Note 11.]

[e] F. N. B. 162. *hæreditate*. [e] But if the coparceners in that case make partition, then every one shall doe homage, because now it is not *una sed diversa hæreditas*. [f] And so it is if one make a feoffment in fee (which is a partition in law for that part) the feoffee shall doe homage, for every tenant in common shall doe severall services. And it hath been adjudged [g] in our bookes, that if the eldest coparcener doe homage to the lord, and afterward the younger sister maketh a feoffment in fee of her part, the lord shall have homage for the part of the younger sister; for that which was *una hæreditas*, one inheritance by law, by the alienation, which is her act, is (as hath beene said) divided and become in groffe, and the coparcenary defeated.

[67. b.]

[b] 7. E. 4. 27, 28. 14. H. 4. 38. 1. H. 5. grant 43. 31. E. 3. gard. 116. [i] 48. E. 3. 8. 15. E. 4. 13. 5. E. 4. 3. But if a tenant in feoffe divers men in fee joyntly, [b] all these jointenants shall joyntly doe their homage, and their fealty also. [i] If homage be due by the tenant, and he maketh a feoffment in fee, the feoffor shall not doe homage; because albeit he is supposed to be tenant in some cases, *quant al avowrie*, yet the feoffee is very tenant, and homage shall ever be done by the very tenant; but that very tenant needeth not to be very tenant of the land, and therefore the mesne because he is very tenant to the lord paramount (though he be not tenant of the land) shall doe homage. And so it is of the disseisee, and of tenant in taile, after a feoffment in fee, for in that case the donee is very tenant to the donor.

If a tenant that holdeth by homage maketh a feoffment in fee of part, [k] that feoffee shall doe homage, and so shall every feoffee of what part soever.

[l] 3. E. 2. Avowrie 187. 13. H. 4. 5. 13. R. 2. tit. Avowrie 89. If there be two coparceners or jointenants of a seigniory, if the tenant doth homage and fealty to one of them, [l] he shall be excused against the other.

8. H. 3. tit. Prescription 38. Hill. 22. E. 1. coram Rege Rot. 43. (Post. 73. a.) If homage be parcell of a tenure, it is a presumption that the tenure is by knights service, unlesse the contrary be proved, but of itselfe it maketh not knights service. And yet by custome the heire of him that holds by homage onely may be in ward.

More shall be said of homage in the title of Homage Ancestrell (1).

(1) [See Note 12.]

CHAP. 2.

Fealty.

Sect. 91.

FEALTY idem est quod fidelitas en Latin. Et quant franktenant ferra fealtie a son seignior, il tiendra sa maine dexter sur un livre, et dirra issint : Geo oyes vous, mon seignior, que jeo a vous ferra foyal et loyal, et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les customes et services queux faire a vous doy, as termes assignes, sicome moy aide Dieu et ses Saints; et basera le lievre. Mes il ne genulera quant il fait fealty, ne ferra tiel humble reverence come avant est dit en homage.

FEALTY is the same that fidelitas is in Latine. And when a freeholder doth fealty to his lord, he shal hold his right hand upon a booke, and shall say thus: Know ye this, my lord, that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his Saints; and he shall kisse the book. But he shall not kneele when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.

FEALTY in French is feaulty, and is [a] derived of the Latin word fides or fidelitas. [a] Bract. lib. 2. fol. 80. Britton, Regist. origin. 302. Mirror, cap. 3. de serement & de fealt. Statut. de 17. E. 2. tit. Homage.

“ Et quant franktenant.” Every freeholder except tenant in frankalmoigne shall doe fealty. [b] And yet some that are not tenants of any freehold shall do fealty, as a tenant for years shall do fealtie (2). Bracton saith, *De nullo tenemento quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis sacramentum*. [b] Bracton, lib. 2. fol. 80. a. Brit. fo. 173. Fleta, lib. 3. ca. 16. Littleton, fo. 29. nu. 132. 4. E. 3. 34. 9. H. 6. 43. 10. H. 6. 13. 5. H. 5. 12. 9. E. 4. 1. 21. E. 4. 29. 5. H. 7. 11.

“ Que a vous ferra foial et loial, &c. et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous ferra les customes et services, &c.”

[68. a.]

[c] Fealtie is a part of homage (1), for all the words of fealtie are comprehended within homage (2), and therefore fealtie is incident to homage. [c] Mirror, cap. 3. de ser. & de fealtie. (4. Co. 8. b.)

“ Sicome moy aide Dieu.” As homage is the more honourable service, so fealtie is a service more sacred, because he is sworne thereunto. And the reason wherefore the tenant is not sworne in doing his homage to his lord is, for that no subject is sworne to another subject to become his man of life and member but to the king onely, and that is called the oath of allegiance, or *homagium ligeum* (3). And those words for that purpose are omitted out of fealtie, which is to be done upon oath. And Littleton said wel (when a freeholder doth

(2) [See Note 13.]

(2) [See Note 15.]

[68. a.]

(3) [See Note 16.]

(1) [See Note 14.]

(7. Co. Calvin's case.)

[d] Stat. de
17. E. 2. tit.
Homage in le
Abridgement.

doth fealtie); [d] for the fealtie of him that holdeth in villenage, differeth from the fealtie of the freeholder. For the villeine holding his right hand upon the booke shall say thus to his lord: Hear you, my lord *A.* that I *A. B.* from this day forward shall be to you true and faithful, and shall owe you fealtie for the land that I hold of you in villenage, and shall be justified by you in bodie and goods, so help me God, &c. as by the act (4) appeareth.

Sect. 92.

ET graund diversitie y ad perenter
fealsans de fealtie et de homage;
car homage ne poit estre fait forsque al
seignior meme; mes le seneschal de court
de seignior, ou bailife, puit prender
fealtie pur le seignior.

AND there is great diversitie
betweene the doing of fealty and
of homage; for homage cannot be
done to any but to the lord himselfe;
but the steward of the lord's court, or
bailife, may take fealty for the lord.

Bracton, lib. 2.
fo. 80.

21. E. 4. 17. acc.

2. E. 3. 10.

32. H. 6. 23. 9. Co. 76.

BRAC^TON, lib. 2. fo. 80. saith thus: *Sciendum est, quòd non per
procuratores nec per literas fieri poterit homagium; sed in propria
persona, tam domini quàm tenentis, capi debet et fieri.*

Vid. for the
signification of
Seneschal and
Bailife, Sect. 78, 79. 248. & 379.

"*Mes le seneschal, &c. ou bailife poet prender fealtie.*" This is so
evident, as it needeth no explanation.

Sect. 93.

ITEM, tenant a terme de vie fer-
ra fealtie, et uncore il ne ferra
homage. Et divers autres diversities
y sont perenter homage et fealtie.

AL^SO, tenant for terme of life
shall doe fealtie, and yet he shall
not doe homage. And divers other
diversities there be betweene homage
and fealty.

9. Co. 76.

THE tenant must doe fealtie in person; because he must be
sworne unto it, and no man can sweare by the common law by
attorney or proctor (5).

Sect. 94.

ITEM, home poit veier 15. E. 3.
coment home et sa feme fieront homage
et fealtie en common banke, quele est
escript devant en tenure de homage.

AL^SO, a man may see in 15. E.
3. how a man and his wife shall
doe homage and fealty in the common
place, which is written before in the
tenure of homage.

Plus ferra dit de fealtie en le tenure
en

More shall be said of fealtie in the
tenure

(4) See the note on this supposed statute
in 67. b. ante.

(5) [See Note 17.]

en focage, et en le tenure en frankalmoigne, et en le tenure per homage auncestrel.

tenure in focage, and in frankealmoigne, and in the tenure by homage aunceftrell.

[68. b.]

THIS is evident, and appeareth before; and if lords knew what benefit they may reape by receiving of homage and fealty, they would not neglect them; [e] for by the receiving of either of them, it is a sufficient seisin of all manner of services, as by the words [f] of either of them appeareth (6). Now if it be demanded what difference is betweene the oath of fealtie, when it is done to the king in respect of a tenure, and the oath which everie subject ought to take in respect of his allegiance, *Littleton* here setteth downe the oath of fealtie. Now the [g] oath of allegiance is thus, You shall sweare, &c. (1) Then it may be demanded, Where and when is this oath to be taken? And it is answered, that whosoever is above the age of twelve yeares, is to be sworne in the tourne, unlesse he be within some leet, and then in the leet (2): and I reade amongst the lawes of Saint Edward (3), *Quod hanc legem invenit Arthurus, qui quondam fuit inclitissimus rex Britannorum, et ita consolidavit et confæderavit regnum Britannia universum semper in unum. Hujus legis autoritate expulit Arthurus prædictus Saracenos et inimicos à regno. Lex enim ista diu sopita fuit et sepulta, donec Eadgarus rex Anglorum excitavit, et erexit in lucem, et illam per totum regnum observari præcepit.* Which law in some manner is observed at this day (4). But to return to *Littleton* (5).

[e] 4. Co. 8.
& 9. Co. Bevil's case. 13. E. 4. 5.
[f] Vid. Sect. 118. 130, 131. 138.

[g] Brit. ca. 29.
Calvin's case. 7. Co. 6. b.
12. H. 7. 18.

Lambert 135.

(6) Vid. that seisin of fealty doth not eslop the tenant from traversing the seisin of other services, 41. E. 3. 25. 50. *John Lilburne's case.* Hal. MSS.—See further as to the advantages accruing from the receiving of homage and fealty, ante 67. b. and post. 92. a. and b. and note 3. in 68. b.

allegiance is regulated by modern statutes, see Com. Dig. tit. *Allegiance*, and Burn's Just. tit. *Oaths*.

(3) As to the laws of Edward the Confessor, the authenticity of those in print is controverted by the famous Dr. Hickes. See Hick. Thesaur. Ling. Septentrion. Dissert. Epist. 95.

(4) [See Note 19.]

(5) [See Note 20.]

[68. b.]

(1) [See Note 18.]

(2) How the taking of the oaths of

CHAP. 3.

Escuage.

Sect. 95. (6)

ESCUAGE est appell en Latine Scutagium, c'estascavoir, Servitium scuti; et tiel tenant, qui tient sa terre per escuage, tient per service de chivaler. Et auxy il est communement dit, que ascun tient per un fee de service de chivaler, et ascun per le moity d'un fee de service de chivaler, &c. Et il est dit, que quant le roy face voyage royal en Escoce pur subduer les Scotés, donques il, que tient per un fee de service de chivaler, covient estre ove le roy pur 40 jours, bien et covenablement array pur le guerre. Et celuy, que tient sa terre per le moitie d'un fee de chivaler, covient estre ove le roy pur 20 jours; et il que tient son terre per le quart part d'un fee de chivaler, covient estre ove le roy pur 10 jours; et issint que pluis, pluis, et que miens, miens.

ESCUAGE is called in Latine Scutagium, that is, service of the shield; and that tenant, which holdeth his land by escuage, holdeth by knights service. And also it is commonly said, that some hold by the service of one knight's fee, and some by the halfe of a knight's fee. And it is sayd, that when the king makes a voyage royall into Scotland to subdue the Scots, then he, which holdeth by the service of one knight's fee, ought to be with the king fortie dayes, well and conveniently arrayed for the war. And he, which holdeth his land by the moitie of a knight's fee ought to be with the king twentie dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.

[a] Mir. ca. 1. iect. 3.
Brit. fo. 162, &c.
Ockam cap.
Quid sit scutagium.
(F. N. B. 83.
C. 2. Ro. Abr.
507. 4. Inst. 192.
Post. 87. a.
106. b.)

“**ESCUAGE**,” [a] in Latine Scutagium, (id est) servitium scuti, service of the shield. Hereby it appeareth that right interpretations and etymologies are necessary: for, *ad rectè docendum oportet primum inquirere nomina, quia rerum cognitio à nominibus rerum dependit.*

Nomina si nescis, perit cognitio rerum.

(Post. 86. b.
177. a.)

And herewith agreeth that which is said, *Primò excutienda est verbi vis, ne sermonis vitio obstruetur oratio, sive lex sine argumentis.*

Scutum in French is Escue, and thereof commeth the Escuer, (i.) Scutifer, which we usually call Armiger. [b] Of this Bracton saith, *Item scutagium dicitur, quòd talis præstatio pertinet ad scutum, quod assumitur ad servitium militare.* And Fleta saith, *Sunt quædam servitia forinseca, et dici possunt regalia, quæ ad scutum præstantur, et inde habemus scutagium, et ratione scuti pro feodo militari reputantur:* and Ockham saith, *Hæc itaque summa, quia nomine scutorum solvitur, scutagium nuncupatur* (7).

[c] Mirr. cap. 1. iect. 3.
[d] 2. E. 3. 8. b.
19. E. 3.
Avowry 294.
(4. Inst. 192.)

[c] Et tiel tenant que tient son terre per escuage, tient per service de chivaler.” [d] For as fealty is incident to homage, so homage and knights

[69. a.]

26. H. 8. 1. a. 20. E. 3. Per quæ servic. 11. 43. E. 3. 22. F. N. B. 83, 84.

(6) Mr. Madox in his Baron. Angl. 227. animadvertes upon this Section of Littleton; as to which see note 2. of 64. a. ante,

and the note at the end of this Chapter of Escuage, post. 74. b.

(7) [See Note 21.]

knights service be incident to escuage, and by the grant of services escuage passeth with the rest. Every tenure by escuage is a tenure by knights service; but every tenant that holdeth by knights service, (Post. 82. b.) holdeth not by escuage, as shall be said hereafter (1). But note here the wisdom of antiquity, [e] *Mavult enim princeps domesticos quàm stipendiarios bellicis apponere casibus*, that is, to be served in his warres by his owne subjects, rather then by stipendiary forainers. [e] Lib. rub.

“*Un fee de service de chivaler.*” [f] There is great diversity of opinions concerning the contents of a knight’s fee, that is, how much land goeth to the livelyhood of a knight. For some say that a knight’s fee consisteth of eight hides, and every hide containeth an hundred acres, and so a knight’s fee should containe 800 acres. Others say, that a knight’s fee containeth 680 acres. Others say, that an oxgange of land containeth 15 acres, and eight oxgangs make a plowland; by which account a plowland containes 120 acres; and that *virgata terræ*, or a yardland, containeth 20 acres. But I hold, that a knight’s fee, an hide or plowland, a yardland or oxgange of land, doe not containe any certaine number of acres (2); but a knight’s fee is properly to be esteemed according to the qualitie, and not according to the quantity of the land, that is to say, by the value, and not by the content (3). And therefore it is very true, which master Camden in his *Britannia*, page 136. saith, viz. *Subsequenti ætate ex censu ut colligitur facti fuerunt equites*, &c. And antiquity thought, that twenty pound land was sufficient to maintaine the degree of a knight, as appeareth in the ancient treatise *de modo tenendi parliamentum* (4) *tempore regis Edw. filii regis Etheldredi*; where it appeareth that *comitatus* (to wit), an earldome, *constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratis*; *baronia constat ex 13. feodis, et 3. parte unius feodi militis* (5) *secundum computationem prædictam*; *unum feodum militis constat ex terris ad valentiam 20l.* Which antiquitie I cite, for that it concurrerh with the act of parliament anno 1. E. 2. *de militibus* (6); by which act *Census militaris* the state of a knight is measured by the value of xx pound *per annum*, and not by any certaine content of acres; and with this agreeth the statute of W. 1. cap. 35. and F. N. B. fol. 82. where twenty pound of land in socage is put in equipage of a knight’s fee; and this is the most reasonable estimate, for one acre may be better than many others, so as he which hath 680 or 800 acres of some barren land, had not according to the ancient account a sufficient revenue to maintaine the degree of a knight, and he which had a lesse number of acres of some land of the value of xx pound *per annum*, had a sufficient livelyhood in those daies for the maintenance of a knight (7). So antiquity thought that 400 markes of land *per annum* was a competent livelyhood for a baron, and

[f] 9. Co. 123.
in Lowe’s case.

Vide 7. Co. 33,
34. Nevil’s case.
(Sid. 128.)

(2. Ro. Abr.
515, 516.
F. N. B. 82. c.)

400

(1) See as to this post. 82. b.

(2) [See Note 22.]

(3) Mr. Selden insists, that a knight’s fee was estimable neither by the value nor the quantity of the land, but by the services or number of knights reserved. Seld. Tit. Hon. 2d ed. part 2. c. 5. f. 26.

(4) See a note on this treatise post. 69. b.

(5) This notion of there being a certain number of knights fees in an earldom and barony is controverted by Mr. Selden; and

he cites instances of earldoms and baronies with a less as well as with a greater number than lord Coke mentions. - Seld. Tit. Hon. 2d ed. part 2. c. 5. f. 26.

(6) Lord Coke in another place observes, that the 1. E. 2. *de militibus*, though called a statute, was only a writ granted by the king in time of parliament, and therefore entered of record. 2. Inst. 593.

(7) [See Note 23.]

400 pound *per annum ad ſuſtinendum nomen et onus* of an earle, and of late time 800 markes *per annum* of a markeſſe, and 800 pound *per annum* of a duke; ſo that their yearly revenue was eſtimated by the value and not by the content. And one plowland, *carucata terra*, or a hide of land, *hida terra*, (which is all one) is not of any certain content, but as much as a plow can by courſe of huſbandry plough in a yeare. And therewith agreeth *Lambard verba Hide*. And a plowland may containe a meſſuage, wood, meadow, and paſture, becauſe that by them the plowmen and the cattell belonging to the plow are maintained. *Vide Temps E. 1. tit. Briefe 860. 4. E. 3. 47. Pl. Com. in Hill. and Grange's caſe, fol. 168. Vide 6. E. 3. fol. 42. and 39. H. 6. 8. a.* And the venerable *Beda* calleth a plowland *familiam*, a family; becauſe it containeth neceſſary things for the maintenance of a family. And *Prifot* well ſaith in 35. *H. 6. fol. 29.* that a plow may till more land in a yeare in one country than in another; and therefore it ſtands with reaſon, that a plowland ſhould be leſſe in one place than in another. 41. *E. 3. tit. Fine 40. and 13. E. 3. Fine 67.* A fine ſhall not be received *de unâ virgatâ terræ* for the uncertainty, *vide 39. H. 6. 8.* But an acre of land is certaine by the ſtatute *de terris menſurandis*. Note alſo (reader) that every plowland of ancient time was of the yearly value of five nobles *per annum*, and this was the living of a plowman or yeoman; and *ex duodecim carucatis conſtabat unum feodum militis*, which amounts to 20 pound *per annum*. And this you may ſee *Termino Paſch. anno 3. E. 1. coram Rogero de Seyton et ſociis ſuis juſtitiariis apud Weſtm. Ebor. Ro. 10. Ratolphus de Normanville petens in brevi de medio queritur contra Luciam de Kyme, quòd cum ipſa teneat de ipſo duas carectatas terræ in Coningſton per homagium et ſervitium militare, unde duodecim carucatæ terræ faciunt unum feodum militis pro omni ſervitio, ipſa diſtrinxit ipſum ad faciendam ſectam ad curiam ſuam de Thorneton in Craven, &c. (1)*

[69. b.]

(Poſt. 76. a.
83. b.)

And it is to be obſerved, that the reliefe of a knight and ail above him which be noble, is the fourth part of their yearly revenue, as of a knight five pound, which is the fourth part of 20 pound. So *una baronia conſtat ex 13 feodis militum et de 3. parte unius feodi militis*, which amount to 400 markes, and therefore his reliefe is the fourth part of this, viz. 100 markes: and an earledome conſiſts of twenty knights fees, which amount to 400 pound (as before it appeareth by the ſaid ancient record *de modo tenendi parliamentum, &c.*) (2), and therefore his reliefe is 100 pound. And this alſo appeareth by the ſtatute of *Magna Charta*, cap. 2. and by the equity of this ſtatute, inſomuch as a marquiſdome, which conſiſts of the revenue of two baronies, which amount to 800 markes, ſhall pay according to that juſt proportion for his reliefe 200 markes; and becauſe a dukedome conſiſts of the revenues of two earledomes, viz. 800 pound *per annum*, a duke ſhall pay 200 for a reliefe, which is alſo the fourth part of his revenue; and with this agree the records of the Exchequer.

Note (reader) at the time of the making of the ſtatute of *Magna Charta*, 9. *H. 3.* there was not any duke, markeſſe, or vicount in England, and therefore the ſtatute could not make mention of them, and Edward the eldeſt ſonne of king *E. 3.* called the Black Prince was the firſt duke in England after the Conqueſt, and Robert earle of Oxford in the reigne of *R. 2.* was the firſt markeſſe. *Sic enim inter ordines*

(1) [See Note 24.]

(2) [See Note 25.]

ordines Angliæ in ſua Britannia teſtatur Camden ubi ſupra. Et titulus Marchionis ſeriùs ad nos devenit, nec ante R. 2. tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias ſuas primum Marchionem Dublinæ designavit, merumque erat honoris nomen. Hæc ille. And before the reigne of H. 6. there was not any viſcount. Sic enim idem author ubi ſupra aſſerit. Poſt comites vicecomites ordine ſequuntur. Viſcounts nos vocamus. Hæc vetus officii ſed nova dignitatis appellatio, et H. 6. tempore ad nos primum audita. Hæc ille. Et dominus de Bello Monte was the firſt viſcount created by king H. 6. Vide Caſſaneum in gloriâ mundi parte 4. conſid. 55. that this dignity of a viſcount is of great antiquity in other realmes.

Braſton, lib. 2. 36. Item ſunt quædam ſervitia, quæ dicuntur forinſeca, quamvis ſunt in cartâ de feoffamentis expreſſa et nominata, et quæ ideo dici poſſunt forinſeca, quia pertinent ad dominum regem, et non ad dominum capitalem, niſi cùm in propriâ perſonâ profectus fuerit in ſervitio, vel niſi cùm pro ſervitio ſuo ſatiſfecerit domino regi, &c.

“*Voyage royal.*” A voyage royall is not onely, when the king himſelfe goeth to warre, as *Littleton* here ſaith, but alſo when his lieutenant or deputy of his lieutenant goeth. And what ſhall be ſaid a voyage royall ſhall be adjudged in this caſe by the judges of the common law as an incident to eſcuage, and not by the conſtable and marſhall, or any other: *et ſic de ſimilibus.*

There is alſo another kind of voyage royall, viz. when one goeth with the king’s daughter beyond ſea to be married, &c. for ſuch a voyage is for the good of the whole realme (for more profit for the realme cannot be then to make alliance with another nation); but of this voyage royall *Littleton* ſpeaketh not here, but onely of the voyage royall to warre; ſo as there is a voyage royall of warre, and a voyage royall of peace and amity. And it is to be obſerved, that he that holdeth by caſtle gard or cornage holdeth by knights ſervice, and yet he ſhall pay no eſcuage, becauſe he holdeth not to goe with the king to warre (3).

“*En Eſcoce,*” *In Scotiam.* This is put but for an example, for if the tenure be to goe in *Walliam, Hiberniam, Vaſconiam, Piſtaviâ, &c.* it is all one. See an ancient record, *Rot. de finibus Terminis Mich. 11. E. 2.* Sir *Rich. Rockeſley* knight did hold lands at *Seaton* by ſerjeanty to be *Vantrarius regis*, that is, to be the king’s fore-foot-man when the king went into *Gascoigne*, donec peruſus fuit pari ſolearum pretii 4d. that is, untill he had worne out a paire of ſhoes of the price of foure pence. And this ſervice being admitted to be performed when the king went to *Gascoigne* to make warre, is knights ſervice.

“*Il que tient per un fee de ſervice de chivaler, covient eſte ove le roy pur 40 jours.*” But this is to be underſtood of a tenant that holdeth of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goeth not, his tenant is excuſed. But yet if the tenant peravaile goeth with the king, it excuſeth all the meſnes.

7 H. 4. 9.
31. Aff. 30.
26. Aff. 66.
27. Aff. 52.
8. E. 3. 154.
7. E. 3. 29.
11. H. 4. 7.
F. N. B. 28. b.
& 83. g.
3. H. 4. 16.
28. H. 6. 1. b.
39. H. 6. 38.
6. R. 2. Protection 46.
19. R. 2.
Gard. 165.
17. H. 6.
Proteſt. 56.
7. E. 4. 27.
11. H. 4. 7.
3. H. 4. 16.
(F. N. B. 84. f.
2. Ro. Abr. 508.)

Lib. Rub. in
Scacc. 47, 48.
19. R. 2.
Gard. 95.
6. R. 2.
Protection 46.
6. H. 3.
Avowry 242.
Vid. Rot. Clauſ.
8. H. 3. & Fin.
8. H. 3. &
Patent. 9. H. 3.
multi ſolverunt
ſcutagium pro
exercit. in Wal-
liam, memb. 30.
& ante Clauſ.
6. H. 3.
memb. 3.

And

Magna Charta,
cap. 37.
Fleta, lib.
cap. 60.

And it is to be observed, that for every pound of the ancient value of a knight's fee accounting twenty pound land, the tenant must goe with the king two dayes, which commeth just to 40 dayes for a whole knight's fee. By the statute of *Magna Charta* it is provided, that *scutagium de cæter' capiatur sicut capi consuevit tempore Hen. regis avi nostri.*

Sect. 96.

[70. a.]

MES il appiert per les plee et arguments faits en un bon plee sur brieve de detinue de un escript obligatorie port per un H. Gray, Tr. 7. E. 3. que ne besoigne a celuy que tient per escuage, de aler ove le roy luy mesme, s'il voile trouver un auter person able pur luy convenablement array pur le guerre de aler ove le roy. Et ceo semble estre bon reason. Car poit estre, que celuy que tient per tiels services est languishant, issint que il ne poit aler ne chivaucher. Et auxy un abbe ou auter home de religion, ou feme sole, que tient per tiels services, ne doit en tiel cas aler en proper person. Et sir W. Herle, adonque chiefe justice de common bank, disoit en tiel plee, que escuage ne serra graunt mes lou le roy alast luy mesme en son proper person. Et fust demurre en judgement en mesme le plee, le quels les xl. jours serront accompts de le primer jour del muster de host le roy fait per les commons et per commandement le roy, ou de la jour que le roy primes entra en Escoce. Ideo quære de hoc. (1)

BUT it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatorie brought by one *H. Gray*, Tr. 7. E. 3. that it is not needfull for him which holdeth by escuage, to goe himselfe with the king, if he will finde another able person for him conveniently arrayed for the warre to goe with the king. And this seemeth to be good reason. For it may be, that he which holdeth by such services is languishing, so as he can neither go nor ride. And also an abbot or other man of religion, or a feme sole, which hold by such services, ought not in such case to goe in proper person. And sir *William Herle*, then chiefe justice of the common place, said in this plea, that escuage shall not be granted but where the king goes himselfe in his proper person. And it was demurred in judgment in the same plea, whether the 40 dayes should be accounted from the first day of the muster of the king's host made by the commons and by the commandement of the king, or from the day that the king first entred into Scotland. Therefore enquire of this.

Tr. 7. E. 3.
fol. 29.

(9. Co. 130.
2. Ro. Abr. 509.)

TR. 7. E. 3. &c. This is the first booke at large that our author has cited. And it is to be observed, that this point is not debated in the said booke, but onely is there admitted, and yet is good authority in law; for our author saith, that it appeareth by this booke. Now both by *Littleton* himselfe, and by the booke of 7. E. 3. it is apparant, that albeit the tenure is, that he which holdeth by a whole

(1) Mr. Madox observes, that sir William Herle's position, that escuage should not be granted but where the king goes to the war

in person, is fallacious. Mad. Baron. Angl. 226.

whole knight's fee ought to be with the king, &c. to do a corporall service, yet he may finde another able man to do it for him.

By the statute of *Magna Charta*, cap. 20. it is provided, that no knight, that holdeth by castle-gard, shall be disfreyned to give money for the keeping of the castle: *Si ipse eam facere voluerit in propria personâ suâ, vel per alium probum hominem faciet, si ipse eam facere non possit propter rationabilem causam.* (4. Co. 88.)

Some have thought, that he that holds by escuage is taken by the equity of this statute, that speaketh onely of castle-gard. But it is holden, that this statute is but an affirmance of the common law. For where that act saith, (*propter rationabilem causam*) that reasonable cause is referred to the tenant's own discretion and choyce, and the cause is not materiall or issuable no more then in the case that *Littleton* here putteth, as hereafter appeareth. And I would advise our student, that when he shall be enabled and armed to set upon the yeare bookes, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applyed either in *Westminster-hall*, (where it is necessary for him to be a diligent hearer, and observer of cases of law) or at readings or other exercises of learning, he may finde out and read the case so vouched; for that will both fasten it in his memory, and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himselfe unto; for there be two things to be avoyded by him, as enemies to learning, *præpostera lectio*, and *præpropera praxis*. But let us now heare what our author will say. (6. Co. 20.)

[70. b.]

"*Et ceo semble bone reason, &c.*" Here *Littleton* sheweth three reasons wherefore the tenant should not be constrained to doe his service in person.

First, it may be the tenant is sicke, so as he is neither able to goe nor ride. And ever such construction must be made in matters concerning the defence of the realme, or common good, as the same may be effected and performed. To the former disability may be added where a corporation aggregate of many, as deane and chapter, maior and commonalty, &c. or an infant being a purchaser, for these also must finde an able man. But it may be objected, that in these particular cases the tenant might finde a man, but not when he himselfe is able without all excuse or impediment. To this it is answered, that *Sapiens incipit à fine*. And the end of this service is for defence of the realme, and so it be done by an able and sufficient man, the end is effected.

Secondly, seeing there are so many just excuses of the tenant, it were dangerous, and tending to the hindrance of the service, if these excuses should be issuable: *Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt.*

Lastly, both *Littleton*, and the booke in the seventh of *Edward* the third, giveth the tenant power, without any cause to be shewed, to finde an able and sufficient man, and oftentimes *jura publica ex privato promiscuè decidi non debent.*

"*Un abbe, ou auter home de religion.*" Note, that if the king had given lands to an abbot and his successors to hold by knights service, this had beene good, and the abbot should doe homage and find a man, &c. or pay escuage, but there was no wardship or reliefe or other incident belonging thereunto. And though the law saith, that

this was a mortmaine, that is, that they held faſt their inheritance, yet if the abbot, with the aſſent of his covent, had conveyed the land to a naturall man and his heires, now wardſhip and reliefe and other incidents belonged of common right to the tenure. And ſo it is, if the king give lands to a maior and communalty and their ſucceſſors, to be holden by knights ſervice, in this caſe the patentees (as hath beene ſaid) ſhall doe no homage, neither ſhall there be any wardſhip or reliefe, onely they alſo ſhall find a man, &c. or pay eſcuage. But if they convey over the lands to any naturall man and his heires, now homage, ward, marriage, and reliefe, and other incidents belong thereunto. And yet this poſſibility was *remota potentia*; but the reaſon hereof is, *Ceſſante ratione legis ceſſat ipſe lex*; the reaſon of the immunity was in reſpect of the body politique, which by the conveyance over ceaſeth, which is worthy of the obſervation.

And it is to be obſerved, that every biſhop in England hath a baronie (2), and that barony is holden of the king *in capite*, and yet the king can neither have wardſhip or relief.

If two joyntenants be of land holden by knights ſervice, if one goeth with the king, it ſufficeth for both, and both of them cannot be compelled to goe, for by their tenure one man is onely to goe.

If the tenant peravaile goeth, it diſchargeth the meſne; for one tenancy ſhall pay but one eſcuage.

G. H. 3.
Avowry 242.
F. N. B. 83, 84.

“*Ou auter home de religion.*” Here this word (religion) is taken largely, viz. not onely for regular, or dead perſons, as abbots, monkes, or the like, but for ſecular perſons alſo, as biſhops, parſons, vicars, and the like; for neither of them are bound to goe in proper perſon. For *nemo militans Deo implicetur ſecularibus negotiis*.

“*Languiſſant.*” So it may be ſaid of an ideot, a mad man, a leper, a man maymed, blind, deaſe, of decrepit age, or the like.

“*Ou ſem ſole.*” Seeing that a ſem ſole, that cannot performe knights ſervice, may ſerve by deputy, it may be demanded, wherefore an heire male being within the age of 21 yeares may not ſerve alſo by deputie, being not able to ſerve himſelfe.

To this it is answered, that in caſes of minoritie, all is one to both ſexes, viz. if the heire male be at the death of the anceſtor under the age of one and twenty, or the heire female under the age of 14, they can make no deputy, but the lord ſhall have wardſhip as an incident to the tenure: therefore *Littleton* is here to be underſtood of a ſeme ſole of full age, and ſeiſed of land holden by knights ſervice either by purchase or deſcent.

[71. a.]

“*Convenablement arraié pur le guerre.*” So as here are foure things to be obſerved.

Fiſt (as hath been ſaid), that he may find another.

Secondly, that he that is found muſt be an able perſon.

Thirdly, he muſt be armed at the coſts and charge of the tenant: and herein is to be noted, *quod non deſignitur in jure*, with what manner of armor the ſouldier ſhall be arrayed with, for time place and occaſion doe alter the manner and kind of the armour (1).

Fourthly, he muſt have ſuch armor as ſhall be neceſſary, and ſo appointed in readineſſe.

Ferdwit is a Saxon word, et significat quietanciam murdri in exercitu. *Worscott* is an old English word, and signifieth liberum esse de oneribus armorum. Fleta, lib. 1. cap. 42.

It is truly said, quod miles hæc tria curare debet, corpus ut validissimum et perniciosissimum habeat, arma apta ad subita imperia, cætera Deo et imperatori curæ esse. Livius.

Sapiens non semper it uno gradu, sed unâ viâ, non se mutat sed aptat. Qui secundos optat eventus, dimicet arte non casu. In omni confictu non tam prodest multitudo, quàm virtus. Vegetius.

Est optimi ducis scire et vincere, et cedere prudenter tempori. Multum potest in rebus humanis occasio, plurimum in bellicis. Polibius.

Quid tam necessarium est, quàm tenere semper arma, quibus tectus esse possis. But I will take my leave of these excellent authors of art military, and referre them to those that professe the same, and will returne to *Littleton*. Vegetius.

“*Muster.*” I find this word in the statute of 18. H. 6. cap. 19. and the ancient military order is worthy of observation; for before and long after that statute, when the king was to be served with souldiers for his warre, a knight or esquire of the country that had revenues farmors and tenants, would covenant with the king, by indenture inrolled in the exchequer, to serve the king for such a terme with so many men (specially named in a list) in his warre, &c. an excellent institution that they should serve under him, whom they knew and honoured, and with whom they must live at their returne. These men being mustered before the king’s commissioners, and receiving any part of their wages, and their names so recorded, if they after departed from their captaine within the terme contrary to the forme of that statute, it was felony. But now that statute is of no force; because that ancient and excellent forme of military course is altogether antiquated; but later statutes have provided for that mischief. (3. Inst. 86; Cro. Cha. 71.) 6. Co. 27. the souldiers case.

To muster is to make a shew of souldiers well armed and trained before the king’s commissioners in some open field; *ubi se ostendentes præcludunt prælio*. In Latine it is *censere, seu lustrare exercitum*.

By the law before the Conquest musters and shewing of armour should be *uno eodem die per univèrsum regnum, ne aliqui possint arma familiaribus et notis accommodare, nec ipsi illa mutuo accipere, ac justitiam domini regis defraudare, et dominum regem et regnum offendere*. (Lamb. fo. 135 b.)

Concerning the point in law, demurred in judgement, in the seventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie dayes after the king entreteth into the foreine nation; for then the war beginneth, and till he come there, he and his host are said to goe towards the warre, and no military service is to be done till the king and his host come thither.

“*Sir William Herle.*” A famous lawyer, constituted chiefe justice of the common pleas by letters patents dated 2. die Martii anno 5. E. 3. It appeareth by *Littleton*, and by the records, that he was a knight, against the conceit of those, that thinke, that the chiefe justices of the court of common pleas were not knighted till long after.

Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you,

the sages of the law in former times (whereof sir *William Herle* was a principall one) have had the deepest reach. And as the bucket in the depth is easly drawne to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with a great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his owne proper element.

Glanville, lib. 2.
cap. 6: &c.

"Justice." In *Glanvil* he is called *justitia in ipso abstracto*, as it were justice itselfe; which appellation remaines still in *English* and *French*, to put them in mind of their dutie and functions. But now in legall *Latin* they are called *justiciarii tanquam justii in concreto*, and they are called *justiciarii de banco*, &c. and never *judices de banco*, &c.

[71. b.]

26. Aff. p. 24.
4. E. 3. fo. 19.
Bracton, lib. 3.
fol. 105. b.
Britton, fol.
1. & 2.
Fleta, lib. 2.
cap. 2.
Mirror, cap. 5.
sect. 1.
Forteſcue, cap.
51. See in the
preface to the
third part of my
Reports.

"Comon banke." *Banke* is a *Saxon* word, and signifieth a bench or high seat, or a tribunall, and is properly applyed to the justices of the court of common pleas, because the justices of that court set there as in a certaine place: for all writs returnable into that court are *coram justiciariis nostris apud Westmon.* or any other certaine place where the court set; and legall records tearme them *justiciarii de banco*. But writs returnable into the court called the king's bench are *coram nobis (i. e. rege) ubicunque fuerimus in Angliâ*; and all judiciall records there are stiled *coram rege*. But for distinction sake it is called the king's bench; both because the records of that court are stiled (as hath beene sayd) *coram rege*, and because kings in former times have often personally sate there (1). For the antiquity of the court of common pleas, they erre, that hold that before the statute of *Magna Charta* there was no court of common pleas but had its creation by or after that charter; for the learned know, that in the fixe and twentieth yeare of *Edward* the third, the abbot of *B.* in a writ of assize brought before the justices in eire claimed conuſance and to have writs of assize and other originall writs out of the king's court by prescription, time out of mind of man, in the raignes of Saint *Edmond*, and Saint *Edward* the Confessor before the Conquest. And on the behalfe of the abbot were shewed divers allowances thereof in former times in the king's courts, and that king *Henry* the first confirmed their usages, and that they should have conuſance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of *Magna Charta* erecteth no court, but giveth direction for the proper jurisdiction thereof in these words: *Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco.* And properly the statute saith, *non sequantur*, for that the king's bench did in those dayes follow the king *ubicunque fuerit in Angliâ*, and therefore enacteth that common pleas should be holden in a court resident in a certaine place. In the next chapter of *Magna Charta* (made at one and the same time) it is provided; *et ea, quæ per eosdem (s. justiciarios itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostros de banco, et ibi terminentur.* And in the next to that, *Assise de ultimâ præsentatione semper capiantur coram justiciariis de banco, et ibi terminentur.* Therefore it manifestly appeareth, that at the making

Mirror, cap. 5.
sect. 2.
Fleta, lib. 2.
cap. 54.

making of the statute of *Magna Charta* there were *justificarii de banco*, which all men confesse to be the court of common pleas. And therefore that court was not erected by or after that statute (2). For the authority of this court, it is evident by that which hath beene said, that it hath jurisdiction of all common pleas. But let us returne to *Littleton*.

“*Demurre en judgement.*” A demurrer commeth of the *Latine* (Doct. Pla. 115. word *demorari* to abide; and therefore he which demurreth in law, 5. Co. 114.) is said, he that abideth in law: *Moratur* or *demoratur in lege*. Whensoever the counsell learned of the party is of opinion, that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgement of the court; and therefore well saith *Littleton* here, *demurre en judgement*; the words of a demurrer being, *quia narratio, &c. materiaque in eadem contenta minus sufficiens in lege existit, &c.* and so of a plea, *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* (5. Co. 69. Hob. 164.) But if the plea be sufficient in law, and the matter of fact be false, then the adverse partie taketh issue thereupon, and that is tried by a jury; for matters in law are decided by the judges, and matters in fact by juries, as elsewhere is said more at large.

Now as there is no issue upon the fact, but when it is joyned betweene the parties, so there is no demurrer in law, but when it is joined; and therefore when a demurrer is offered by the one party, as is aforesaid, the adverse party joyneth with him, (for example) saith, *quod placitum prædictum, &c. materiaque in eodem contenta bonum et sufficiens in lege existunt, &c. et petit judicium*, and thereupon the demurrer is said to be joyned, and then the case is argued by counsell learned of both sides; and if the poynts be difficult, then it is argued openly by the judges of that court, and if they or the greater part concur in opinion, accordingly judgement is given; and if the court be equally divided, or conceive great doubt of the case, then may they adjourne it into the exchequer chamber, where the case shall be argued by all the judges of *England*; where if the judges shall be equally divided, then (if none of them change their opinion) it shall be decided at the next parliament by a prelate, two earles, and two barons, which shall have power and commission of the king in that behalfe, and by advice of themselves, the chancellor, treasurer, the justices of the one bench and the other, and other of the king's counsell as many and such as shall seeme convenient, shall make a good judgement, &c. And if the difficulty be so great as they cannot determine it, then it shal be determined by the lords in the upper house of parliament (1). See the statute, for it extends not onely to the case aforesaid, but also where judgments are delayed in the chancery, king's bench, common bench, and the exchequer, the justices assigned, and other justices of oyer and terminer, sometime by difficulty, sometime by divers opinions of justices, and sometime for other causes.

[a] Before which statute, if judgements were not given by reason of difficulty,

fo. 1. 21. 35. 40. E. 3. 34. 13. H. 4. 3. 4.

[a] 4. E. 3. ca. 14.

(2) [See Note 30.]

to have the opinion of all the judges, 4. Inst. 110. 118. and *Warraine and Smith*, 2. Bulstr. 146. in which case the court refused to grant a motion for such an adjournment.

[72. a.]

(1) See further, as to the adjourning of causes into the exchequer chamber in order

Vid. Braet. lib. 5. fo. 352. b.

14. E. 3. cap. 5. Statut. 1.

Rot. Parlia. 14. E. 3. nu. 31. a proceeding in sir John Stanton's case upon difficulty in the court of common pleas. Vide Britton, fol. 41. 21. E. 3. 37, 38. 39. E. 3.

[b] Braſton,
lib. 1. cap. 2.
nu. 7.
Brit. fo. 41.
1. E. 3. 7, 8.
2. E. 3. 6, 7.
[c] 17. E. 3.
50. b.
47. E. 3. 13, 14.
5. H. 7. 1.
13. E. 4. 7. b.
Pl. Com. 85.
411. 172.
(5. Co. 69. b.
1. Sid. 10.
Poſt. 125.
Hob. 232, 233.
Doc. Pla. 115,
116.)
48. E. 3. 15.
2. R. 2. inqueſt. 2. 38. E. 3. 25. 11. H. 4. 5. 75. 3. E. 4. 2.
caſe. 5. Co. 74. Wymek's caſe. 10. Co. 88. uſque 98. Doct̃or Leyfield's caſe. (1. Leon. 178.
Doc. Pla. 116, 117.)

difficulty, the doubt was decided at the next parliament, (which then was to be holden once every yeare at the leaſt) (2). [b] *Si autem talia nunquam prius evenerint, et obſcurum et difficile ſit eorum judicium, tunc ponatur judicium in reſpectum uſque ad magnam curiam, ut ibi per concilium curiæ terminentur.* But hereof thus much ſhall ſuffice.

[c] He that demurreth in law confeſſeth all ſuch matters of fact as are well and ſufficiently pleaded. If there be a demurrer for part and an iſſue for part, the more orderly courſe is to give judgement upon the demurrer firſt; but yet it is in the diſcretion of the court to try the iſſue firſt, if they will. After demurrer joyned in any court of record, the judges ſhall give judgment according as the very right of the cauſe and matter in law ſhall appeare, without regarding any want of forme in any writ, returne, plaint, declaration, or other pleading, proces, or courſe of proceeding, except thoſe onely which the party demurring ſhall ſpecially and particularly ſet downe and expreſſe in his demurrer (3). [a] Now what is ſubſtance and what is forme you ſhall read in my Reports.

[b] 13. E. 4. 7.
31. E. 3. Eſtop-
pel. 244.
33. H. 6. 9, 10.
22. E. 4. 50.
1. H. 7. 21.

And in ſome caſes a man ſhall alledge ſpeciall matter, and conclude with a demurrer; [b] as in an action of treſpaſſe brought by *I. S.* for the taking of his horſe, the defendant pleads that he himſelfe was poſſeſſed of the horſe untill he was by one *I. S.* diſpoſſeſſed, who gave him to the plaintife, &c. the plaintife ſaith that *I. S.* named in the barre and *I. S.* the plaintife were all one perſon, and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law, and the court did hold the plea and demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurrer upon counts and pleas, ſo there may be of aid prier, voucher, receipt, waging of law, and the like. [c] By that which hath been ſaid it appeareth, that there is a generall demurrer, that is, ſhewing no cauſe, and a ſpeciall demurrer, which ſheweth the cauſe of his demurrer. Alſo by that which hath bene ſaid, there is a demurrer upon pleading, &c. and there is alſo a demurrer upon evidence. [d] As if the plaintife in evidence ſhew any matter of record, or deeds or writings, or any ſentence in the eccleſiaſticall court, or other matter of evidence by testimony of witneſſes, or otherwiſe, whereupon doubt in law ariſeth, and the defendant offer to demurre in law thereupon, the plaintife cannot reſuſe to joine in demurrer, no more then in a demurrer upon a count, replication, &c. and ſo *è converſo* may the plaintife demurre in law upon the evidence of the defendant.

[d] 5. Co. 104. a.
Baker's caſe.

[e] 38. H. 8.
Dyer 53.
(Cro. Eliz. 752.)

But if [e] evidence for the king in an information or any other ſuit be given, and the defendant offer to demurre in law upon the evidence, the king's counſell ſhall not be inforced to joyne in demurrer; but in that caſe, the court may direct the jury to finde the ſpeciall matter.

“*En judgement.*” For the ſignification of this word, *Vide* Sect. 366.

(2) See 4. Inſt. 9. and Com. Dig. Par-
liament, C.

(3) See 27. Eliz. c. 5. and 4. An-
c. 16.

Sect. 97.

ET apres tiel voyage royal en Escoce, il est communement dit, que per authoritie de parliament l'escuage serra assesse et mis en certaine; scilicet, certaine summe d'argent, quant chescun, que tient per entier fee de service de chivaler, quel ne fuit per luy mesme, ne per un auter pur luy, ove le roy, paiera a son seignior de que il tient la terre per escuage. Sicome mittomus, que il fuit ordaine per authoritie de la parliament, que chescun, que tient per entier fee de service de chivaler, que ne fuit ove le roy, payera a son seignior xl s. dunque celuy que tient per moitie d'un fee de chivaler, ne payera a son seignior forsque xx s. et celuy que tient per la quart part de fee de chivaler, ne payera forsque xs. et sic que plus, plus, et que meins, meins.

AND after such a voyage royall into Scotland, it is commonly said, that by authority of parliament the escuage shal be assessed and put in certaine; scil. a certaine summe of money, how much every one, which holdeth by a whole knight's fee, who was neither by himselfe, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authoritie of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord fortie shillings; then he which holdeth by the moitie of a knight's fee, shall pay to his lord but twentie shillings; and he which holdeth by the fourth part of a knight's fee, shall pay but xs. and he which hath more, more, and which lesse, lesse (5).

“ **A**PRES voiage royall, &c. il est communement dit, que per authority de parliament escuage serra assesse.” Nota, here is a secret of law included, that albeit escuage incertaine be due by tenure, yet because the assessment thereof concerned so many and so great a number of the subjects of the realme, it could not be assessed by the king or any other but by parliament: [a] and this was by [a] 13. H. 4. 5. the common law (1).

[b] No escuage was assessed by parliament since the reigne of Edward the second, and in the eight yeare of his reigne escuage was assessed (2).

[b] 8. H. 3.
Rot. Clauf. &
Rot finium,
& ante.

memb. 30.

If the tenant goeth with the king, and dyeth in exercitu, in the host or armie, he is excused by law, and no escuage shall be demanded.

Staff. P. 14 E. 1.
de banco.

And it is to be observed, that if he that holds of the king by escuage, goeth, or findeth another to goe for him with the king, &c. then he shall have escuage of his tenants that hold of him by such service (3), which must be assessed by parliament.

F. N. B. 84.
Braet. lib. 2.
36. a.

But if the king's tenant goeth not with the king, then he shall pay for his default escuage, and shall have no escuage of his tenants (4). Richard the second making a voyage royall into Scotland, at the petition of his commons pardoned the payment of escuage.

F. N. B. 84.
Rot. Parl.
9. R. 2. nu. 40.

(1) [See Note 31.]

(4) [See Note 33.]

(2) See ante 69. b. note 3.

(5) [See Note 34.]

(3) [See Note 32.]

Sect. 98.

ET ascuns teignent per la custome (6), que si l'escuage courge per autoritie de parliament a ascun summe de money, que ils ne paieront forsque la moitie de ceo, et ascuns teignent que ils ne payeront forsque le quart part de ceo. Mes pur ceo que l'escuage que ils paieront est non certain, pur ceo que n'est certaine coment le parliament assessor l'escuage eux teignent per service de chivaler. Mes auterment est de l'escuage certaine, de que serra parle en le tenure de socage.

Vid. Sect. 120. "ASCUNS teignent per custome, &c."
 15. E. 2. tit.
 Avow. 215.
 26. Aff. 65. 30. E. 3. 23. b. 4. Co. 88. in Luttrell's case.

"Mes auterment est de escuage certaine." Here it appeareth, that escuage is two-fold, viz. escuage incertaine, whereof *Littleton* here speaks; and escuage certain. *Quemadmodum incertitudo scutagii facit servitium militare, ita certitudo scutagii facit socagium.* But more of this in the Chapter of Socage, Sect. 120. [73. a.]

"Per parliament." Of the antiquitie and autoritie of this court, see Sect. 164.

Sect. 99.

ET si home parle generalment d'escuage; il serra entendue per le common parlance d'escuage non certaine, que est service de chivaler. Et tiel escuage trait a luy homage, et homage trait a luy fealtie; car fealtie est incident a chescun manner de service, forsque a la tenure en frankalmoigne, comme serra dit apres en le tenure de frankalmoigne. Et issint il que tient per escuage, tient per homage, fealtie, et escuage.

AND if one speake generally of escuage, it shal be intended by the common speech of escuage incertaine, which is knights service. And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unlesse it be to the tenure in frankalmoigne, as shal be said afterward in the tenure of frankalmoigne (1). And so he, which holdeth by escuage, holds by homage, fealty, and escuage (2).

"ET

(6) The words in L. and M. and Roh. are *ascun tenantes teignent*, and the words *per la custome* are omitted.

[73. a.]

(1) See acc. Mad. Baron. Angl. 166.

(2) [See Note 35.]

“ *ET si home parle generalment d'escuage, il serra intend per le com-
mon parlance d'escuage non certain.*”

*Verba æquivoca et in dubio posita intelliguntur in digniori et potenti-
ori sensu.* Tenure in capite ex vi termini is a tenure in grosse, and it
may be holden of a subject; but being spoken generally, it is *secun-
dum excellentiam* intended of the king, for he is *caput reipublicæ*.

110. 367. 377. 393. 406. 462, 463. 5. E. 2. Resceit 165. 20. H. 6. 23. 37. H. 6. 29. 13. H. 4. 4. 6. El. Dyer 236. 10. E. 4. 11. 32. E. 3. Gard. 31. Brit. fo. 163.

“ *Et tiel escuage trait a luy homage, et homage trait a luy fealtie ;
car fealtie est incident a chescun manner de service, forsque a tenure en
frankealmoigne.*” This is gathered by the effects of their tenure,
for essences are found out by properties, fountains by rivers, and
causes by effects: for amongst others, the lords shall have escuage of
their tenants, &c. as it followeth.

Sect. 100.

73. b.] *ET est ascavoir, que quant escuage
est tielment assesse per autoritie
de parliament, chescun seignior, de que
le terre est tenus per escuage, avera
l'escuage issint assesse per parliament ;
pur ceo que il est intendus per la ley,
que al commencement tiels tenements
fueront dones per les seigniors a les
tenants de tener per tielx services, a
defender leur seigniors auxy bien come le
roy, et mitter en quiet leur seigniors et
le roy de les Scotès avantdits.*

AND it is to be understood, that
when escuage is so assessed by
authoritie of parliament, everie lord,
of whom the land is holden by escuage,
shal have the escuage so assessed by
parliament; because it is intended by
the law, that at the beginning such
tenements were given by the lords to
the tenants to hold by such services,
to defend their lords aswell as the king,
and to put in quiet their lords and the
king from the Scots afore said.

Sect. 101.

*ET pur ceo que tiels tenements devi-
enront primes des seigniors, il est
reason que ils averont l'escuage de leur
tenants. Et les seigniors en tiel case
purront distreiner pur l'escuage issint
assesse, ou il's en ascuns cases purront
aver brieve le roy direct as viconts de
meme les counties, &c. de levier tiel
escuage pur eux, sicome appiert per le
Register. Mes de tiels tenants, queux
teignent per escuage de roy, queux ne
fueront ove le roy en Escoce, le roy mesme
avera l'escuage.*

AND because such tenements came
first from the lords, it is reason
that they should have the escuage of
their tenants. And the lords in such
case may distreine for the escuage so
assessed, or they in some cases may
have the king's writs directed to the
sheriffs of the same counties, &c. to
levie such escuage for them, as it ap-
peareth by the Register. But of such
tenants, as hold of the king by
escuage, which were not with the
king in Scotland, the king himselte
shal have the escuage.

F. N. B. 84.
Register 88. de
Scutagio ha-
bendo.

“ *LES seignours averont l'escuage, &c.*” This is evident.

“ *Briefe le roy.*” This commeth of the *Latine* word *Breve*.

Fitzh. in his preface to his *N. B.* saith of them, that they be those foundations, whereupon the whole law doth depend.

[a] *Bracton*,
lib. 5. fol. 413.
Fleta, lib. 2.
cap. 12.
Britton, fol. 122.
227.
(1. *Sid.* 187.)
(7. *Co.* 4. a.
4. *Inst.* 10.)

[a] *Bracton* describeth a writ thus: *Breve quidem, cum sit formatum ad similitudinem regulæ juris; quia breviter et paucis verbis intentionem proferentis exponit, et explanat, sicut regula juris rem, quæ est, breviter enarrat. Non tamen ita breve esse debeat quin rationem et vim intentionis contineat.*

Of writs some be original, *brevia originalia*, and some be judiciall, *brevia judicialia*.

Also of originals, *quædam sunt formata sub suis casibus et de cursu, et de communi consilio totius regni concessa et approbata, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum; et quædam sunt magistralia, et sæpe variantur secundum varietatem casuum, factorum et quærelarum; as for example, actions upon the case, which varie according to the varietie of everie man's case, and the like; and these being not of course, the masters being learned men did make. Item brevium originalium alia sunt realia, alia personalia, alia mixta. Item brevium originalium, alia sunt patentia sive aperta, et alia clausa.* Certaine it is, that the originall writs are so artificially and briefly compiled, as there is nothing redundant or wanting in them, of which an honourable secretary of state once said, that it was not possible to comprehend so much matter so perspicuously in fewer words. Of all these kinds of writs you shal read plentifully in the *Register*, whereof *Littleton* maketh mention in this place, and also in *Fitzh. N. B.*

(*Plowd.* 228. a.
4. *Inst.* 79.)
Bracton, ubi
supra.
Britton, ubi
supra.
Regist. 88.
F. N. B. 84.

“ *Sicome appiert per le Register.*” *Register* is the name of a most ancient booke, and of great authoritie in law, containing all the originall writs of the common law; of which booke see more in the preface to the ninth part of my Reports, and containeth also *brevia judicialia, quæ sæpius variantur secundum varietatem placitorum proponentis et respondentis* (1).

Also it appeareth by the *Register*, that the king shal have escuage of his tenants, which hold of him as of a manor which he hath in ward (2), or by reason of a vacation of a bishopricke.

And so shall a common person, if he hath an estate for life or for yeares of a seigniory.

F. N. B. 84.

ITEM, en tel case avantdit, lou le roy face un voyage royall en Escocce (1), et l'escuage est assesse per parliament, si le seignior distreine son tenant, que tient de luy per service d'entier fee de chivaler, pur

ITEM, in such case aforesaid, where the king maketh a voyage royall into Scotland, and the escuage is assessed by parliament, if the lord distraine his tenant, that holdeth of him by service of a whole knight's fee,

(1) See further as to the Register of Writs, *Nichols. Engl. Histor. Libr.* 2d ed. 205.

(2) See ante 72. b. note 3.

[74. a.]

(1) [See Note 36.]

pur l'eſcuage iſſint aſſeſſe, &c. et le tenant plede, et voit averrer, que il fuit ove le roy en Eſcoce, &c. per xl. jours, et le ſeignior voit averrer le contraire, il eſt dit, que il ſerra trie per le certificat del marſhall del hoſt le roy (2) en eſcript ſouth ſon ſeale (3), que ſerra mis a les juſtices.

fee, for the eſcuage ſo aſſeſſed, &c. and the tenant pleadeth, and will aver, that he was with the king in Scotland, &c. by 40 dayes, and the lord will averre the contrary, it is ſayd, that it ſhall be tryed by the certificat of the marſhall of the king's hoſt in writing under his ſeale, which ſhall be ſent to the juſtices.

“**E**T voit averrer, que il fuit ove le roy en Eſcoce per 40 jours, (6. Co. 21.) &c. [a] il eſt dit, que il ſerra trie per le certificat del marſhall.” [a] 2. E. 4. 11. 4. E. 4. 10. 21. E. 4. 10. F. N. B. 85. 11. H. 7. 5. 9. Co. 32. Caſe

This is a tryall appointed by the law, *ne curia regis deficeret in juſticiâ exhibendâ*. [b] Herewith agreeth the Register, where the marſhall is called *conſtabularius exercitus noſtri*.

de Strat. Marc. [b] Regiſt. 88. F. N. B. 84. 2. E. 4. 1. 4. E. 4. 10. 9. H. 4. 3. 11. H. 7. 5. 21. H. 6. 50. 33. H. 6. 1. 45.

“*Marſhall del hoſte le roy,*” *Mareſchallus exercitus*, in Saxon *Mariſchalk*, i. e. *equitum magiſter*. This word Marſhall is either derived of Mars, or of mare an horſe, and ſchalc, which ſigniſieth in the Saxon tongue, a maſter or governor. [c] In the lawes before the Conqueſt it is ſaid, *Mareſchalli exercitus ſeu duſtores exercitus Here- roches per Anglos vocabantur. Illi ordinabant acies denſiſſimas in præliis et alas conſtituebant, prout decuit, et prout ei melius viſum fuerit ad honorem coronæ et ad utilitatem regni.* [d] And here it is to be obſerved, that his certificate in this caſe is a trial in law. I read of fixe kinds of certificates allowed for trials by the common law; the firſt whereof Littleton here ſpeaketh of, in time of warre out of the realme. 2. In time of peace out of the realme. [e] As if it be alledged in avoydance of an outlawrie, that the defendant was in priſon at *Burdeaux* in the ſervice of the maior of *Burdeaux*, it ſhall be tryed by the certificate of the maior of *Burdeaux*. 3. For matters within the realme, [f] the cuſtome of London ſhall be certified by the maior and aldermen by the mouth of the recorder. 4. By certificate of the ſherife upon a writ to him directed [g] in caſe of privilege, if one be a citizen or a forreiner. 5. Tryall of records by certificate of the judges in whoſe cuſtody they are by law. All theſe be in temporall cauſes. 6. In cauſes eccleſiaſticall, as loyalty of marriage, generall baſtardie, excommengement, profeſſion; theſe and the like are regularly to be tried by the certificate of the ordinarie (4).

And there be divers other trialls allowed by the common law, than by a jury of 12 men, which you may reade at large in the ninth booke of my Reports, fol. 30, 31, &c. in the caſe of the abbot of *Strata Marcella*, which are as plainly ſet downe there, as they can be here. And in this caſe, if the triall ſhould not be by certificate, it ſhould want triall, which ſhould be inconvenient. Onely in this place I will adde ſomething of a foreine triall which I finde not in any

(2) In L. and M. the words are *conſtable juſtices* are omitted.

(3) In L. and M. there is an &c. after Com. Dig. tit. *Certificate*, and title *Trial* in ſeale, and the words *que ſera mis a les Viner* and the other Abridgments.

(4) See further as to trial by certificate,

any of the treatises lately published against single combats; because it may deterre men from that ungodly and unlawful kinde of revenge, whereupon many murders have ensued, and prevent all hope of impunity for default of triall in that case.

Stat. de 1. H. 4.
cap. 14.
13. H. 4. fol. 5.
Vid. Rot. Par-
liam. 8. H. 6.
nu. 38.
Stanf. Pl. Cor.
fo. 65.

[*] Anno
25. Eliz.
(Post. 261.
Hut. 3.)

If a subject of the king be killed by another of his subjects out of *England* in any forreine country, the wife or he that is heire of the dead may have an appeale for this murder or homicide before the constable and the marshall, whose sentence is upon testimony of witnesses or combate. And accordingly, where a subject of the king was slaine in *Scotland* by others of the king's subjects, the wife of the dead had her appeale therefore before the constable and the marshall. And so it was [*] resolved in the raigne of queen *Elizabeth* in the case of sir *Francis Drake*, who strook off the head of *Dorwtie in partibus transmarinis*, that his brother and heire might have an appeale. *Sed regina noluit constituere constabularium Angliæ, &c. et ideo dormi- vit appellum.*

[74. b.]

If a man be mortally wounded in *France*, and dieth thereof in *England*, it is said that an appeale doth lie upon the said statute; for it is not punishable by the common law, and the proceeding there (as hath beene said) is upon witnesses or combate, and not by jurie, and the mortal wound was given out of the realme (1).

(1) [See Note 37.]

CHAP. 4.

Of Knights Service.

Sect. 103.

TENURE per homage fealty et escuage est a tener per service de chivaler, et trait a luy gard mariage et relief. Car quant tiel tenant morust, et son heire male est deins l'age de 21 ans, le seignior avera la terre tenus de luy tanque al age del heire de 21 ans; le quel est appel pleine age, pur ceo que tiel home, per entendement del ley, n'est pas able de faire tiel service de chivaler devant l'age de 21 ans. Et auxy si tiel heire ne soit marie al temps de mort de tiel auncester, donque le seignior avera le garde et le mariage de luy. Mes si tiel tenant devie, son heire female esteant d'oge de 14 ans ou de plus, donque le seignior n'avera my le garde del terre, ne de corps; pur ceo que feme de tiel age poit aver baron able de faire service de chivaler. Mes si tiel heire female soit deins l'age de 14 ans, et nient marie al temps de la mort son auncester, donque le seignior avera le garde de la terre tenus de luy tanque al age de tiel heire female de 16 ans; pur ceo que il est done per le statute de Westm. 1. cap. 22. que per 2 ans procheine ensuant les dits 14 ans, le seignior poit tender convenable mariage sans disparagement a tiel heire female. Et si le seignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine des dits 2 ans poit enter et ouste son seignior. Mes si tiel heire female soy marie deins l'age de 14 ans en la vie son ancester, et son auncester devy, el esteant deins l'age de 14 ans, le seignior n'avera forsque la garde de la terre jusques a fine de 14 ans d'age de tiel heire female, et donque son baron et luy poient enter en la terre, et ouste le seignior. Car ceo est hors de cas de le dit estatute, entant que le seignior ne poit tender mariage a luy que est marie, &c. Car devant le dit estatute Westm. 1. tiel issue female, que fuit deins age de 14 ans al temps de mort son auncester,

et

TENURE by homage fealty and escuage is to hold by knights service, and it draweth to it ward mariage and reliefe. For when such tenant dyeth, and his heire male be within the age of 21 yeares, the lord shall have the land holden of him untill the age of the heire of 21 yeares; the which is called full age, because such heire, by intendment of the law, is not able to doe such knights service before his age of 21 yeares. And also if such heire be not married at the time of the death of his ancestor, then the lord shall have the wardship and mariage of him. But if such tenant dieth, his heire female being of the age of 14 yeares or more, then the lord shall not have the wardship of the land, nor of the bodie; because that a woman of such age may have a husband able to doe knights service. But if such heire female be within the age of 14 yeares, and unmarried at the time of the death of her ancestor, the lord shall have the wardship of the land holden of him until the age of such heire female of 16 yeares; for it is given by the statute of W. 1. cap. 22. that by the space of two yeares next ensuing the sayd 14 yeares, the lord may tender convenable mariage without disparagement to such heir female. And if the lord within the said two yeares do not tender such mariage, &c. then she at the end of the said 2 yeares may enter, and put out her lord. But if such heire female be married within the age of 14 yeres in the life of her ancestor, and her ancestor dieth, she being within the age of 14 yeares, the lord shall have only the wardship of the land untill the end of the 14 yeares of age of such heire female, and then her husband and she may enter into the land, and oust the lord. For this is

out

et puis que el avoit accompli l'age de 14 ans, sans aucun tender de mariage per le seignior a luy, tiel heire female donque puisset enter en le terre et ouste le seignior, sicome appiert per le rehearsall et parolx de le dit statute; issint que le dit statute fuit fait en tiel cas tout pur l'avantage de seigniors, come il semble. Mes uncore ceo tous foits est entendue per les parolx de meme le statute, que le seignior n'avera le deux ans apres les 14 ans, come est avantdit, mes lou tiel heire female soit deins l'age de 14 ans, nient marie al temps de mort son ansester.

out of the case of the said statute, in-
somuch as the lord cannot tender
marriage to her which is married, &c.
For before the said statute of W. 1.
such issue female, which was within
the age of 14 yeares at the time of the
death of her ancestor, and after she
had accomplished the age of 14 yeares,
without any tender of marriage by the
lord unto her, such heire female might
have entred into the land and ousted
the lord, as appeareth by the rehearsall
and words of the said statute; so as
the said statute was made (as it
seemeth) in such case altogether for
the advantage of lords. But yet this
is alwayes intended by the words of
the same statute, that the lord shall not
have these two years after the 14
yeares, as is aforesaid, but where such
heire female is within the age of 14
yeares, and unmarried at the time of
the death of her ancestor (1).

(6 Co. 73. b.)

[a] Glanvil.

lib. 7. cap. 10.

[b] Regist. 2.

30. E. 3. 24.

[c] Glanvil.

lib. 7. cap. 14.

[d] Glanvil.

lib. 7. cap. 9.

&c. Fleta,

lib. 1. cap. 8.

locis.

"SERVICE de chivaler." Nota, it appeareth by [a] the Register, that it is [b] said *unum feodum militis*, and not *feodum unius militis*, as it was said [c] by some of old; and so *duo feoda militis*, &c. and sometime these fees are called *feoda militaria* [d]. Our author, having before treated of homage fealty and escuage, now commeth to knight service itselfe. In *Domesday* it is thus recorded: *Episcopus Baiecentis ille qui tenent de Modardo, reddit ei 50 s. et servitium unius militis.*

Bracton, lib. 2. fo. 85. Britton, fol. 162. & fo. 28. & 95. Ockam in diversis locis. Mirror, cap. 1. sect. 3. Sud. Diton.

"Chivaler," i. e. eques, knight, is a Saxon word, and by them written *cnite*. Chivaler taketh his name from the horse; because they alwayes served in warres on horseback. The Latines called them

(1) In L. and M. and the Pap. MS. there is the following addition: Item si un home tient un maner de un auter per serayce de chivaler, et il tient un auter maner de un auter home per un tiel serayce, mez il tient l'un maner per priorite, &c. et l'auter maner per posteriorite, et ad issue file, et devie, et les maners descendent al file adonques eleant deins l'age de 14 auns, et le seignour de que un dez maners est tenu per priorite seist le garde del corps del heire et de le maner tenuz de luy, et l'auter seignour seist le garde del auter maner tenuz de luy, en cest case quant la file vient al age de 14 auns, ele entrera en le maner tenuz per posteriorite coment que ele soit adonques desmarie. Car les parols de meme l'estatute de Westminster premier sont

en tiel forme que ensuyt. Les heires femels, puis que eles avyront complie age de 14 aunz, et le seignour, a qui le mariage appent, celes ne voudra marier, mez per coventise de la terre celes voudra tener dismariez, purveu est que le seignour ne puisse aver ne tener per encheson de la mariage les terres de celes heirez females outer deux auns aprez le terme dez avauntdiz 14 auns, &c. per queux parols il poet estre prove, que apres les 14 aunz null doit aver les terre en tiel case, &c. forsque celui, a qui le mariage appent, &c. et pur ceo que tiell mariage n'appent a celui, de qui la terre est tenus per posteriorite, &c. tiell heir femel, quant ele vient al age de 14 auns, poet bien entre en tiel terre, que issint est tenus per posteriorite, &c.—See 35. H. 6. 52.

them equites, the Spaniards cavalleroes, the Frenchmen chivaliers, the Italians cavallieri, and the Germanes reiters, all from the horse. It is necessary to be seene by what names this service of a knight is called. It is called [e] *Servitium forinsecum, quia pertinet ad dominum regem et non ad capitalem dominum, nisi cum in propria personâ profectus fuerit in servitio, et nisi cum pro servitio suo satisfecerit domino regi, &c.* Ideo forinsecum dici potest, quia fit et capitur foris, sive extra servitium quod fit domino capitali. And it is called *scutagium*, as it appeareth [f] by Littleton and many authorities before recited; sometime *droit de espée*. Also it is called [g] *regale servitium, quia specialiter pertinet ad dominum regem. Ut si dicatur in cartâ, faciendo inde forinsecum servitium, vel regale servitium, vel servitium domini regis, quod idem est, &c.* And another saith: *Et sunt quædam servitia forinseca, quæ dici poterunt regalia, quæ ad scutum præstantur; et inde habemus scutagium, et ratione scuti pro feodo militari reputantur, &c.* So as in respect of him that doth it, it is called *servitium militis*; but in respect of him for and to whom it is done, viz. to the king, and for the realme, it is called *servitium regale, or servitium domini regis, &c.* [b] In ancient time they which held by knights service were called *milites, qui per loricas, &c. defendunt et deseruiunt, &c.* and sometime this service is called *servitium hauberticum*. And in ancient time, such as held by knights service for the defence of the realme had many priviledges granted to them by law: as for example, they might have a writ *de essend' quiet' de tallagio*, the effect whereof was [i], *Si Tho. filius Ranulphi terram suam teneat per servitium militare, sicut domino regi monstravit, tunc nullum ab eodem Tho. capient tallagium nec pro eo dando ipsum distringant, vel homines suos qui per consimile servitium teneant.* And this agreeth with the ancient charter of king Henry the first, before mentioned, which he made on the day of his coronation for the restitution of the ancient lawes. [k] *Militibus, qui per loricas terras suas defendunt et deseruiunt, terras dominicarum carucat' suarum quietas ab omnibus gildis, et omni opere, &c. concedo:* and the reason thereof is there yeilded: *Sicut tam magno gravamine allevati sint, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et defensionem regni mei.* But these priviledges and quittances are discontinued, and the charge remaineth.

It is called commonly in [l] our bookes, *servitium militare, &c.* or *servitium militis*. And this service was created and provided for the defence of the realme, to performe which service the heires are not accounted in law able till the age of one and twenty yeares. Therefore during their minority, the lord shal have the custody of them, not for benefit onely, but that the lord might see, that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy sciences.

[m] *Si hæreditas teneatur per servitium militare, tunc per leges infans ipse, et hæreditas ejus, &c. per dominum feodi illius custodientur, &c. Quis putas, infantem talem in artibus bellicis, quas facere ratione tenuræ suæ ipse astringitur domino feodi sui, melius instruere poterit, aut velit, quàm dominus ille, cui ab eo servitium tale debetur, et qui majoris potentie et honoris æstimatur, quàm sunt alii amici propinqui tenentis sui? Ipse namque, ut sibi ab eodem tenente melius serviatur, diligentem curam adhibebit, et melius in hiis eum erudire expertus esse censetur quàm reliqui amici juvenis, &c. et reverâ non minimum erit regno accommodum, ut incolæ ejus in armis sint experti, nam audacter quilibet facit, quod se scire ipse non diffidit.*

[e] Bract. lib. 2. fo. 36, 37.

Britton, fol.

164, 165.

Fleta, lib. 3.

cap. 14.

19. E. 2.

Avowry 224.

26. Ass. 65.

31. Ass. 30.

30. E. 3. 23.

8. E. 3. 67.

7. H. 4. 19.

(Ante 68. b.)

[f] Bracton,

ubi supra.

Fleta, lib. 3.

cap. 14.

[g] Britton,

fol. 187.

Bracton, ubi

supra.

[b] Carta Hen.

prim. Mat. Paris.

Mirror, cap. 2.

sect. 17.

[i] Rot. Claus.

19. H. 3. m. 22.

[k] Carta H. 1.

in libro rub.

fol. 41. in

scaccario.

[l] Glanvil.

lib. 7. ca. 9, 10.

Fleta, lib. 1.

ca. 8. & 9. &

lib. 3. cap. 16,

17, &c.

Bracton, lib. 2.

cap. 16.

Mirror, cap. 5.

sect. 2.

Britton, 162.

(4. Inst. 192.)

[m] Fortescue,

cap. 44.

[n] Lamb. fol.
135. a.

See W. 1. cap. 48.
the Second Part
of the Institutes.
(6. Co. 22.
Post. 248.)

20. Aff. p. 7.
(2. Ro. Abr. 404.
Doc. Pla. 106.)

[a] Grand. cust.
de Norm.
cap. 35.
Regist. orig.
fo. 87.
Glanvil. lib. 9.
ca. 8. 35.
Fleta, lib. 2.
cap. 40. & lib. 3.
ca. 14.
Mirror, ca. 1.
feft. 3.
Britton, fo. 55.
& 70.
F. N. B. 82. b.
W. 1. ca. 35.
25. E. 3. ca. 11.
11. H. 4. 34.
5. E. 3. 11.
rege Rot. 43.

[n] Amongst the lawes of Saint *Edward* the Confessor, it is thus provided: *Debent enim universi liberi homines, &c. secundum feodum suum, et secundum tenementa sua arma habere, et illa semper prompta conservare ad tuitionem regni, et servitium dominorum suorum juxta præceptum domini regis explendum et peragendum.* And *William* the Conqueror confirmed that law in these words: *Statuimus et firmiter præcipimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti habeant et teneant se semper in armis ei in equis ut decet, et oportet, et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum semper opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, &c.* Out of these two lawes the studious and learned reader will gather divers notable things. And therefore if after the lord hath the wardship of the body and the land, the lord doth release to the infant his right in the feignorie, or the feignorie descendeth to the infant, he shall be out of ward both for the body and the land; for he was in ward in respect he was not able to doe those services which he ought to doe to his lord, which now are extinct, and *cessante causâ cessat causatum.* And our author saith, that the tenure by knights service draweth unto it ward, marriage, &c. so as there must be a tenure continuing. As if the conusor in a statute merchant be in execution, and his land also, and the conusee release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect.

[76. a.]

“*Et trait a luy gard, mariage, et reliefs.*” So as regularly there be fixe incidents to knights service, (viz.) two of honour and submission, as Homage and Fealtie; and foure of profit, viz. Escuage, whereof he hath treated before, Ward (*i. e.* wardship of the land), Mariage and Reliefs; of all which our author hath spoken. But there be other incidents to knights service besides these; [a] as *Aide pur faire fite chivalier, et aide pur file marier, &c.* which at the common law were uncertaine, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgment of the court where they were questioned, they ought not to be paid: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading (1).

“*Gard,*” or *Ward*, in *Latine custodia.* And hereof the lord is called *gardian, custos*, and the *minor* is called a ward, or one in ward. [b] And albeit (as our author saith) knight service draweth with it ward, &c. yet by custome the heire of him that holdeth in socage, may be in ward.

Vid. Sect. 110. [b] 8. H. 3. Præscript. 38. Pasch. 21. E. 1. Coram
Nota pro Hibernia Prior del St. Pinitie de Dublin's case.

“*Marriage,*” *Maritagium*, betokeneth, not onely the copulation of man and wife in mariage, but also (as in this place here) the interest of the gardian in bestowing of a ward in marriage, which the law gave to the lord; not for his benefit onely, but that he should match

(1) [See Note 38.]

match him vertuously and in a good family without disparagement, as shall be said hereafter, which is the principall foundation of his estate.

[c] "*Reliefe*," *Relevium*, is derived from the *Latine* word *relevare*; for so [d] ancient authors say, and give this reason: *Quia hæreditus, quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, et propter factam relevationem facienda erit ab hærede quædam præstatio, quæ dicitur relevium.* And in *Domesday* it is called *relevamentum* and *relevatio*.

The reliefe of a whole knight's fee is five pound, and so according to that rate. And this reliefe was as some hold certaine by the common law; [*] but the reliefes of earles and barons were uncertaine, and therefore were called *relevia rationabilia*; but the statute of *Magna Charta*, cap. 2. limits them in certaine, and mentioneth only a knight's fee. But I reade in the book of *Domesday*, *quod Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma sua, et equum unum cum sellâ et alium sine sellâ; quod si essent ei canes vel accipitres, præstabantur regi, ut si vellet acciperet.*

Since *Littleton* wrote [e] there is a good law made against fraudulent feoffments, gifts, grants, &c. contrived of fraud to hinder or defraud lords, &c. of their reliefes and heriots amongst other things, for the exposition of which statute reade the authorities quoted in the margent. And it is to be observed, that the words of the said act of 13. *Eliz.* are, (*be it therefore declared, ordained, and enacted*) and therefore like cases, and in semblable mischief shall be taken within the remedie of this act by reason of this word (*declared*), whereby it appeareth what the law was before the making of this statute (2).

See also the statutes of 3. H. 7. c. 4. & 50. E. 3. ca. 6. Vide Mich. 12. & 13.

"*Son heire male.*" [f] For regularly by the common law the heire shall not be in ward, unlesse he claime as heire by descent. The statute of *Merton*, *de hiis qui primogenitos feoffare solent*, [g] did helpe feoffments by collusion in certaine cases. And *Britton* saith, that *Robert de Walrand* a sage of the law did advise the great lords of the realme to make the said statute, which when it was past, the same act tooke his first effect in the heire of *Walrand's* own heire, whereof *Britton* maketh a speciall remembrance. But now [h] by the statutes of 32. and 34. H. 8. of wills, he which holdeth lands by knights service may by act executed in his life time, or by his last will in writing, dispose of two parts, as by the said acts appeareth. If he dispose all by act executed, then it shall stand good against the heire, so as nothing shall descend unto the heire. But in case of a devise by his last will, a third part shall descend to the heire, though all be devised away: and if the tenant leave a third part to descend, then the devise is good for the residue. [i] But these things require so many diversities grounded upon evident reasons, and are so plainly expressed in my Commentaries, as they (being very long) shall not need to be repeated here. [k] And that the tenure by knights service draweth to it ward marriage and reliefe, is of great antiquity, for so it was in the time of king *Alfred* (1).

(2) See a note on the subject of *relief*, post. 83. a.

[76. b.]

(1) This shews, that in lord Coke's

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opinion the feudal tenures were settled here before the Conquest. But as to this controverted point, see note 1. of 64. a.

Q

[c] Vid. Sect. 112.

[d] *Bracton*, lib. 2. ca. 36. fol. 84.

Fleta, lib. 1.

ca. 10. & lib. 3.

ca. 16, 17.

Britt. ca. 69, 70.

Glanvil. lib. 9.

ca. 4. & lib. 7.

ca. 9. *Ockam*

de differentiis

releviorum.

(Ante 69. b.

Post. 83. a.)

[*] *Ockam* ubi supra.

Bracton, lib. 2.

fo 85.

[e] 13. *Eliz.*

ca. 5. 17 E. 3.

Reliefe 3.

7. E. 3. ib. 11.

3. Co. 80, &c.

Twine's case.

5. Co. 60.

Gooche's case. 1

6. Co. 18.

Pakeman's case.

10. Co. 56. b.

Eliz. *Dier* 295.

[f] *Britt.* 168.

Fleta, lib. 1. ca. 9.

[g] *Merton*, ca. 6

(11. Rep. 23.)

Bract. fo. 85.

Britt. fo. 65.

9. H. 4. 6.

4. H. 7. ca. 17.

27. H. 7. 89.

Partridge's case.

Pl. Com. 82.

[h] 32. H. 8.

ca. 1.

34. H. 8. ca. 5.

(10. Co. 80.)

[i] 3. Co. 25, 26.

in *Butler's* case.

6. Co. 75. in fir

George Curzon's

case. 8. Co. 163.

Might's case.

Eod. lib. fo. 171.

in *Vigil Parker's*

case.

[k] *Mir.* ca. 1.

sect. 3.

"Quant

"*Quant tiel tenant mort.*" Here *Littleton* speaketh not of a dying seised by the tenant, for in many cases the heire shall be in ward, albeit the tenant died not seised, &c. nor in the homage of the lord. As if the tenant maketh a feoffment in fee upon condition, and the feoffor dieth, after his death the condition is broken, the heire within age entreth for the condition broken, he shall be in ward, and yet the feoffor had no estate or right in the land at the time of his death, but onely a condition, and which was broken after his decease.

(1 Co. 99.)

[*] 39. E. 3. 36.
tit. Gard. 92.

33. E. 3.
Gard. 162.

11. H. 7. 12.

19. E. 3.

Gard. 114. 18. Aff. 18. 40. Aff. 36. 20. El. 362. 4. H. 6. 16. b. F. N. B. 143. 6. H. 4. 4. a.

[?] 7. H. 4. 12.

1. H. 7. 12.

22. E. 4. 7. 6.

40. E. 3. 43.

4. M. 136.

15. E. 4. 10, 11.

[?] And so I doe take it, that if the heire within age recover in a *dum non fuit compos mentis*, or *formedon en descender*, or remainder as heire, or such like, the heire shall be in ward; for these be stronger cases than the former; for here a right doth descend to the demandant, which right being by course of law restored to the possession of the heire within age, by consequence the lord is to have the wardship of him, but in the case of the condition, no right at all descended to the heire, as hath beene said.

33. E. 3.

Gard. 162.

(2. Ro. Abr. 38.)

And so if tenant in tayle, the remainder in fee, maketh a feoffement in fee, and dyeth leaving the issue in taile within age, if the feoffee infeoffe the issue in taile, whereby he is remitted, he shall be in ward to the lord; for as he is restored to the title of the land as heire, so is the lord restored to his title of the wardship as lord of the fee. And as to this purpose herein I take no difference betweene a right of action and a right of entry descending, when by action the right of the land is lawfully recovered by the heire within age, to his tenant: and albeit he dyed not in his homage, yet there was a right of homage, and no default or laches was in the lord, or act done by him to prejudice himselfe thereof.

11. H. 7. 12.

But if one levie a fine executorie (as *sur grant et render*) to a man and his heires, and he to whom the land is granted and rendred, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never tenant to the lord, and so there is a manifest diversitie betweene this and the other cases. *Et sic de cæteris.*

13. El. Dyer 298.

But if the tenant maketh a feoffement in fee of lands holden by knights service to the use of the feoffee and his heires, untill the time that the feoffor pay to the feoffee or his heires a hundred pounds, for the which a time and place is limited; the feoffee dyeth, his heire within age, the lord shall have the wardship of the bodie of the heire, and of the lands of the feoffee, conditionally, for he cannot have a more absolute interest in the wardship, than the heire hath in the tenancie: therefore if the feoffor pay the money at the day and place, and entreth into the land, in this case both the wardship of the bodie and lands is devested, because the lord had no absolute interest in either of them, but doth depend upon the performance or not performance of the condition.

(Post. 248. a.)

[*] 12. H. 4. 16.

per Thirning.

[*] So if the conusor of a fine executorie of lands holden by knights service dyeth, his heire within age, the lord shall have the wardship of the bodie and land: but if the conusee entreth, the heire is disherited, and the lord hath lost the whole benefit of his wardship.

If the disseisee dyeth, his heire being within age, [m] the lord shall have the wardship of the heire of the bodie of the disseisee. [n] But put the case, that in that case the disseisor dieth seised, and his heire within age, the lord may seise the wardship of his heire also, and of the land also: but the doubt is, whether the heire of the disseisee shall, after the descent to the heire of the disseisor, continue in ward, for that after the descent the heire of the disseisor is become his lawful tenant, and the heire of the disseisee is not tenant unto him untill he hath recovered the land.

[m] 41. E. 3. 225.

[n] 15. E. 4. 11.

If *cestui que use* before the statute of 27. H. 8. had dyed, his heire within age, the lord [o] should have had the wardship of his heire; and if the feoffee had dyed, his heire within age, the lord should have had the wardship of his heire also, and so a double wardship for one and the same land, the one by the statute of 4. H. 7. the other by the common law.

[o] 14. H. 8. 5.
4. H. 7. cap. 17.

[p] Tenant by knights service maketh a gift in taile, the remainder in fee, tenant in taile maketh a feoffment in fee, and dyeth, his heire within age, the lord shall have the wardship of him; and if the feoffee dieth, his heire within age, the lord shall have the wardship also of his heire, and of the land.

[p] 41. E. 3. 26.
tit. Avowrie 264.
20. H. 6. 9.
48. E. 3. 8. b.
10. E. 3. 26.
31. E. 3. tit.
7. E. 4. 27.

Gard. 116. 18. E. 3. 7. 14. H. 4. 38. 1. H. 5. Grant 43. 5. E. 4. 3. 15. E. 4. 13. 2. E. 2. Avow. 181.

77. a.]

If tenant by knights service maketh a gift in taile, and the donee maketh a feoffment in fee, and the donee dieth, his heire within age, the donor shall have the wardship of him; because he is his tenant in right. [q] But if the feoffee dieth, his heire within age, the donor shall not have the wardship of his heire, but the lord paramount; because he is tenant *in fait* to him; neither shall the donor avow upon the feoffee or his heire for the services due unto him, because he must in his avowry shew the reversion in fee to be out of him by the feoffment, and consequently the services incident to the reversion are also out of him, but he shall avow upon the donee and his issues: [r] and thus are all the bookes that seeme to be at variance, either answered or reconciled.

(2. Ro. Abr. 38.)

[q] So was it holden Tr. 18. El. in Com. Banco, per Cur. which myselfe heard and noted, in sir Thomas Wyat's case. [r] So was it resolved in sir Tho. Wyat's case ubi supra.

[a] "*La terre tenus de luy, &c.*" Littleton here speaketh of lands holden of a subject: for if a man hold land of the king by knights service *in capite*, and other lands of other lords, and dieth, his heire within age, the king shall have the wardship of all the lands by his prerogative: and this was due to the king by the common law, the fees of certaine excepted, as in the statute of *prærogativa regis*, cap. 1. appeareth.

[a] Glanv. lib. 7. cap. 10. Bract. lib. 2. fo. 85, 86, 87. Brit. 1. 3. c. 2. Fleta, 1. 1. c. 10. 9. H. 3. Prerog. 25. 21. H. 3. ib. 26.

Rot. Finium. 6. Johan. Stat. Prærog. Reg. c. 1.

But if a man holdeth lands of the king by knights service, as of an honor or mannor, &c. [b] in that case the king shall onely have the lands holden of him, and not of any other. Yet by reason of tenures of the king by knights service of certaine honours, (while they were in the king's hands) the king (as some have said) had (as it were by prescription) his prerogative, viz. *Raleigh hage net bonony* and *Peverel*, and so of lands holden by knights service of the duchy of *Lancaster* in the county palatine (1).

[b] Bract. ub. supra. Mag. Carta, ca. 31. 1. E. 6. ca. 4. 5. E. 3. 5. 47. E. 3. 21. 29. H. 8. Br. tit. Livey 58. 28. H. 8. ibid. 55. (2. Ro. Abr. 503.)

When

(1) [See Note 39.]

[c] 8. Co. 172.
Hale's case.
38. H. 8. Br.
tit. Livery 60.
Vid. Se^{ct}. 154.
(F. N. B. 255.
E.)

[d] 1. El. Dier
168.

[e] 32. H. 8. tit.
Liv. Br. 62.

[f] 38. H. 8.
Liver. Br. 60.
45. E. 3. 11.
35. H. 6. 52.
Stanf. 13. b.
[g] 20. El. Dy.
362.
F. N. B. 259. b.

[h] F. N. B. 263.
7. E. 4. 17.
Stanf. Præ.
13. Br. tit.
Liv. 64.

[i] 46. E. 3. 33.
47. E. 3. 21.
21. H. 6. 28. b.
33. H. 6. 50.
29. Aff. 8.
Pl. Com. Count.
of Leicester's
case. 44. E. 3. 1.
& 25. 12. R. 2.
Liv. 28.
2. H. 7. fol. 14.
[a] 1. H. 4. 6. b.
37. H. 8. Estop.
Br. 1. 218.
7. E. 6. ib. 222.
Scurfield's case.
Tr. 8. Ja. in cur.
Ward. 23. El.
Dier 377.
28. H. 8. Br.
tit. Liv. 56.

41. E. 3. 5.
5. E. 6. 6.
27. Aff. 48.
Pl. Com. 252.
20. El. Dyer 360.
(10. Co. 64. a.)
[c] 32. H. 8. 46.
33. H. 8. cap. 21.
(4. Inst. 188.)

[c] When an heire hath bin in ward to the king by reason of a tenure *in capite*, after his full age he must sue livery, which is halfe a yeare's profit of his lands holden. But if he be of full age at the time of the death of his ancestor, then he shall pay for lands in possession a whole yeare's profit for *primer seisin*: but if it be of a reversion expectant upon an estate for life, as tenant in dower, tenant by the curtesie, or tenant for life, then he shall pay but the moiety of one yeare's profit.

[d] If the heire be in ward by reason of a tenure of an honour or mannor, (except as before) he shall not sue liverie, but an *ouster le maine cum exitibus*, albeit he never made tender. [e] And if he be of full age, the king shall have no *primer seisin*, but reliefe. But where the tenure is *in capite*, there the king shall have the meane profits untill the tender be made; and if the tender be made, and not duely pursued, the king shall also have all the meane profits.

[f] He that holdeth of the king by focage in chiefe, and dieth, his heire of full age, the king shall have livery and *primer seisin* onely of the lands so holden, and not of the lands holden of others. [g] But if the heire of such a tenant in focage in chiefe be within the age of fourteene at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after: and the reason thereof is, for that the custodie of his body and lands in that case belong to the *prochein amy*, as gardian in focage. [h] Neither shall the king have *primer seisin* of lands holden in burgage, (as some have said) for that it is no tenure *in capite*.

Note, there is a generall livery, and a speciall livery. A generall livery hath two properties:

First, it is full of charge to the heire, for he must have an office in every county where he hath land, or else he cannot sue a generall livery, and he must sue out his writ of *æstate probandâ*, &c.

[i] The second property is, that it is full of danger: first, it concludeth the heire for ever after to denie any tenure found in the office: secondly, if livery be not sued of all and of every parcell which the king ought to have, whether it be found in the office or not found (for a generall livery could not be sued by parcels) the liverie is void, and the king may reseise the lands, and be answered of the meane profits. So it is if the office be insufficient, or the processe whereof the livery was made be insufficient, or the like, the king shall reseise, as is aforesaid. [a] Therefore for the ease of the heire, and for avoyding of such danger, the heire for the most part sueth out a speciall livery, which containeth a beneficiall pardon and saveth the said charges, and preventeth the said conclusion, and the other dangers; which being of grace, and not of right, as the generall livery is, the king may well and justly take more for a speciall livery, than for a generall, for the causes aforesaid, but ever with such moderation as the heire may cheerfully goe through therewith.

Note, that a livery is in nature of a restitution, which is to be taken favourably: for if livery be made of a mannor *cum pertinentiis*, the heire shall thereby have the advowson appendant. Otherwise it is in grants by letters patehts.

Since the time that *Littleton* wrote [c] there is a court of wards and liveries erected by authority of parliament concerning the order of the king's wards, &c. to be holden before the master of the wards and the councell of that court appointed by those acts. This hath

[77. b.]

hath made such a manifold alteration, as were too long here to be inserted, and doth belong to another treatise mentioned in the Epistle of the Jurisdiction of Courts, where it were necessary, that the true jurisdiction of that court should be set downe, a matter of no great difficulty, seeing it began so late by authority of parliament. And since *Littleton's* time, [d] there is a right profitable statute made concerning the finding of offices and other things, not onely concerning the king's wards, or their rights and possessions, but some other provisions very beneficiall for the subject, in all to the number of 12. [e] 1. That such persons as hold for tearme of yeares, or by copy of court roll, or have any rent common or profit *apprender* out of any lands found in any office, whereby the king is intituled to the wardship of the lands or tenements, or to the forfeiture of the lands or tenements upon attainder of treason, felony, *præmunire*, or any other offence, yet may they have, hold, enjoy, and perceive their severall estates, interests, and profits, although they be not found in the office. And this being a beneficiall law, the estates of tenant by statute staple merchant and *elegit*, and executors that hold lands for payment of debts, are taken to be within the benefit of the clause: [f] and so is a doubt in 14. *El. Dier* cleared.

[d] 2. E. 6. ca. 8.

(9. Co. 16.)

[e] 4. E. 4. 23.
33. H. 8. tit.
Entre Congeabl.
Br. 125.[f] 14. Eliz.
Dier. fo. 319.

2. Where it is found, that the heire is of fewer yeares than in truth he is, he shall not be concluded hereby, [g] but every such heire at his very full age may prosecute a writ of *ætatè probandâ*, and sue his livery or *ouster le maine*: in which case he had no remedy by the common law.

[g] 5. Mar.
Dier 156.

[a] 3. Where one person or more be found heire, where another person is heire, the partie grieved had no remedy.

[a] 24. E. 3. 31.
38. 9. H. 6. 18.
12. E. 4. 16.
5. E. 4. 4.
F. N. B. 262.

30. Aff. 28. 4. Co. 56. & 60. Sadler's case. Stanf. Prærog. 58. b. 52.
16. E. 4. 4. 1. H. 7. 14. 2. H. 7. 12. 4. H. 7. 15. 8. H. 7. 11.
12. R. 2. Livery 28. F. N. B. 233. 7. Co. 44, 45. Ken's case.

4. Or where one person or more be found heire in one county, and another person or persons found heire in another county, there could have beene no interpleading.

5. Or if any person be untruly found by office lunaticke, or ideot, or dead, the party grieved may traverse the said offices; and you may reade in *Ken's* case how the office shall be traversed upon this act.

[b] 6. Where it is untruly found by office, that any person attainted of treason, felony, or *præmunire*, is seised of any lands, &c. the party grieved, having just title of freehold, shall have his travers or *monstrans de droit* (without being driven by this double matter of record to his petition of right as he was before this statute) which is much more speedy than the petition; for upon the petition there be foure writs of search, and every one must have 40 dayes before the serving, and now but two writs of search.

[b] 4. E. 4. 23.
10. H. 6. 19.
4. Co. 56, &c.
Sadler's case.
32. H. 8. Entre
Cong. Br. 125.
14. E. 3. cap. 14.

[c] 7. Where an office is found by these words or the like, *quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant*, or holden of the king *per quæ servitia juratores ignorant*, it shall not be taken for any immediate tenure of the king in chiefe, but in such cases a *melius inquirendum* to be awarded, as hath beene accustomed of old time. This branch hath beene well [d] expounded; for if the first office finde a tenure of the king *per quæ servitia*, &c. yet if upon the *melius inquirendum* the tenure be found of a subject, the first office hath lost his force *per sensum hujus statuti*, and need not be traversed, and the *melius*, &c. is in nature of the *diem clausit extremum*

[c] Vide 6. Co.
6. Wheeler's
case.[d] 12. Eliz.
Dier f. 292. a.
8. Co. 168. Paris
Stoughter's case.

13. Eliz. Dier
306.
4. H. 6. 13.
10. H. 4. 2. b.

mun or *mandamus*, &c. And this was but a declaration of the ancient common law, as by the words of the statute (*as hath bene accustomed of old*) it appeareth; but if upon the *melius* it be found againe as uncertainly as before is said, then it is in judgement of law a tenure *in capite*, and so it was before the making of this act, and so are the bookes that speake hereof to be intended; but if upon the *melius* a tenure be found of the king *ut de manerio per quæ servitia*, &c. it shall be taken for knights service.

8. Where it is found that lands, &c. are holden of the king immediately, where in truth they are holden of a common person and not of the king immediately, and that the heire is within age, such heire within age shall have his traverse, &c. which he could not have had by the common law.

9. The meane lords of whom the lands are holden, which the king hath by his prerogative during the minority of the heire, shall receive and take such rents as are due unto them by the hands of such of the king's officers as receive the profits of the same lands, where before that act, the lords used to spare the rents due, &c. during the king's possession, and after livery sued charged the heire with all the arrearages.

10. There is a provision for offices found before the statute or before the 20th day of *March* next after the act.

11. A speciall clause is, that a *seire fac'* shall be awarded upon every travers by force of this act, and where the party was put to his petition, there upon the travers there shall be two writs of search granted.

12. And lastly, if judgement shall be given against the king upon a travers by vertue of this act, all former rights appearing of record are saved to the king. But albeit these points are most necessary to be knowne, yet let us now returne to *Littleton*.

15. E. 4. 12.
46. E. 3. 12.
21. H. 6. 11.
3. H. 7. 5.

Littleton warily and materially (treating of a common person) saith, *tenus de luy*, holden of him, for he shall have nothing in ward but that which is holden of him. But the king by his prerogative shall not onely have such lands and tenements, which (as hath been said) the heire of his tenant by knight service *in capite* holdeth of others, but such inheritances also as are not holden at all of any, as rent charges, rent secke, fayres, markets, warrens, annuities, and the like; and so is the law cleerely holden at this day, as it hath bene resolved; and so experience teacheth, that the king by his prerogative given to him by the ancient common law shall have those inheritances not holden, and so the *quære* made by [o] *Stauford* is cleered and made without question.

[78. a.]

[o] Stanf, Præf.
fo. 8.

The law is changed since *Littleton* wrote in many cases both for the marriage of the body, and for the wardship of the lands, and a farre greater benefit given to the lords then the common law gave them, and some advantage given to the heires, which before they had not, which shall be touched briefly.

Merlebridge,
ca. 1.
Pl. Com. 82.
27. H. 8. 10.
33. H. 6. 14.

If the father had made an estate for life or a gift in taile of lands holden by knights service to his eldest sonne, or other heir apparent within age, the remainder in fee to any other, and dyed, the heire should not have bene in ward; for this was out of the statute of *Merlebridge*. But at this day the heire shall be in that case in ward for his body, and a third part of his land.

[a] 31. E. 3.
Collusion 29.
33. H. 6. 14.

[a] So if the father had infeoffed his eldest sonne within age and a stranger and the heires of the sonne, and died, the sonne should have bene out of ward; but at this day he shall be in ward

for

for his body, and for a third part of his moiety. [b] So if the father had infeoffed any of his younger sonnes or others for the making of his wife a joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoffe and convey the land to his heire and dyed, his heire within age, his heire should not have beene in ward; because he was bound by the law of nature and nations to provide for them; but now in all these cases the heire shall be in ward for his body, and a third part of the land, and all this groweth by construction upon the statutes of 32. and 34. H. 8. [c] But if either the eldest sonne, or any of the younger sonnes purchase lands of his father, which are holden by knights service, *bonâ fide*, for the reasonable value, this is out of those statutes, and the heire shall neither be in ward, nor pay *primer seisin*.

And in all the cases abovesaid, (for example) if a feoffement be made to the use of his wife for life, or to the use of any of his younger sonnes for life, or to the use of some persons for life for payment of debts, and upon all these estates a remainder is limited over, if the wife or tenant for life dye in the life of the father, [d] or if it be conveyed to the use of the wife or younger children in fee, or fee-taile, or in fee for payment of debts, and these lands are conveyed away in the life time of the father, after the decease of the father no wardship, &c. accrueth by force of any of the said statutes, for such estates must continue till the title of wardship doe grow (1).

[e] If the father convey his lands holden by knights service either of the king or of any meane lord to his middle sonne in taile, the remainder to the youngest sonne in fee, and dyeth, the eldest being within age, and the king or lord seize the body and two parts of the land, if the middle brother dye without issue, the king or the lord shall not have any benefit of the statute against him in remainder; for the statute was once satisfied, and the statute extendeth not to him in remainder.

[f] If there be a grandfather, father, and divers sonnes, and the grandfather in the life of the father convey his lands holden by knights service to any of the sonnes, this is out of the statute of 32. H. 8. and if the grandfather die, there is neither wardship nor *primer seisin* due; for the father hath the immediate care of his sons (2). But if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the sonnes, it is within the said statute: [g] and a conveyance to the use of any of his collaterall blood, which is not his heire apparent, is out of the said statute. And so are conveyances either by father or mother to or to the use of bastard children out of the statute; for *qui ex damnato coitu nascuntur, inter liberos non computantur*. And the preamble speaketh of lawfull generations. If a man seised of lands holden in socage convey them to the use of his wife, or of his children, or payment of his debts, and after purchase lands holden by knights service *in capite*, and dieth, his heire within age, the king shall have no part of the socage land. [b] But if in that case he had by his will in writing devised his socage lands in fee, and after purchased lands holden *in capite*, and dieth, the king shall have so much of the socage lands as will make a full third part of

[b] 33. H. 6. 14.
27. H. 8. 7.
6. Co. 76, 77.
Sir George Curson's case.
10. Eliz. 260.
3. Eliz. 193.
20. Eliz. 361.
19. Eliz. 276.
5. Mariæ 158.

[c] 10. Co. 83.
Leonard Lovey's case.

[d] 2. Co. 91.
Bingham's case.
6. Co. ubi
supra 84.
8. Co. 165.
Digbye's case.

[e] 14. Eliz.
Dier 308.
3. Mariæ
Dier 130.
2. Co. 93, 94.
Bingham's case,
and Northcot's
case
10. Co. 80. b.
Leonard Lovey's
case.

[f] 6. Co. 77.
Sir George Curson's case.
2. Eliz. Dier 181.
8. Eliz. Dier 252.

[g] 10. Co. 83.
Leon. Lovey's
case. 18. Eliz.
Dier 385.

[b] Leon.
Lovey's case,
ubi supra.
Butler and
Baker's case,
3. Co. 25, &c.

(1) Vid. Trin. 8. Jac. Ley 21. *Allicock's case*. Hal. MSS.

(2) [See Note 40.]

all. The benefits, that grew to the subject by those acts of parliament, were, that tenants in fee simple might devise their lands by their last wills in writing in such manner and forme, as by the said acts appeareth; also that the father might infeoffe his eldest sonne or other heire lineall or collaterall of his lands holden by knights service, and two parts of the lands shall be out of ward. And in * *Might's* case you shall reade excellent matter of estates made upon collusion (3).

* 8. Co. 163.
Might's case.

And both the statutes of 32. and 34. H. 8. concerning wills and wardships are many wayes prejudiciall to the heires; as, taking one example for many, if tenant by knights service make a feoffment in fee to the use of his wife and her heires, or to the use of a younger sonne and his heires, or wholly for the payment of his debts; in these cases, although nothing at all of the lands so holden descend to the heire, but he is disinherited of the same, yet his body shall be in ward. But this for a little taste may suffice. More hereof you may reade in my Reports in the several cases noted in the margin.

[78. b.]

Leon. Lovey's
case, ubi supra.
22. Eliz.
Dier 367.

32. E. 3.
Gard. 61.

" *Pleine age.*" Full age regularly is one and twenty yeares.

2. H. 5. 4.
(6. Co. 20.
Ante 73. a.
Post. 314. b.)

" *Entendement de ley.*" *Entendement, i. e. intellectus*, the understanding or intelligence of the law. Regularly judges ought to adjudge according to the common intendment of law.

10. H. 6. 8.
21. E. 3. 33. a.
27. H. 8. fo. 10.

By intendment of law every parson or rector of a church is supposed to be resident on his benefice, unlesse the contrary be proved.

Of common intendment one part of a mannor shall not be of another nature than the rest.

Of common intendment a will shall not be supposed to be made by collusion. *In facto quod se habet ad bonum et malum, magis de bono, quam de malo lex intendit. Lex intendit vicinum vicini facta scire. Nulla impossibilia aut inhonesta sunt presumenda, vera autem et honesta, et possibilia. Lex semper intendit quod convenit rationi.* As in this case, the gardian shall have the custody of the land untill the heire come to his full age of one and twenty yeares; because by intendment of law the heire is not able to doe knights service before that age, which is grounded upon apparent reason. There note, that the full age of a man or woman to alien, demise, let, contract, &c. is one and twenty yeares, the civill law five and twenty yeares, for then the *Romanes* accounted men to have *plenam maturitatem*, and the *Lombards* at eightene yeares.

Vide Britton,
fol. 169.

" *Si le heire ne soit marie al temps del mort de tiel auncester, &c.*" *Auncester* is derived of the *Latine* word *anteceffor*, and in law there is a difference between *anteceffor* and *prædeceffor*. For *anteceffor* is applied to a natural person, as *I. S. et anteceffores sui*; but *prædeceffor* is applied to a body politique or corporate; as *Episcopus London. et prædeceffores sui. Rector de D. et prædeceffores sui, &c.*

Glanvil. lib. 7.
cap. 1. Mirror,
cap. 5. sect. 2.
Britton, fol.
168. b.
39. H. 6. cap. 2.

" *Mes si tiel tenant devie son heire female esteant del age de 14 ans, &c.*" And the reason, as I finde in antiquity, wherefore the law gave the mariage of the heire female if she were within the age of fourteene,

fourteene, and that she should not marry herself, was, *pur ceo que les heires females de nostre terre ne se marieront a nous enemies, et dount il nous co-viendroit lour homage prendre, si eux se pussent marier a leur volunt.* This is a speciall age for an heire female to be out of ward, if she attaine unto it in the life-time of her ancestor; for at that age she may have a husband able to doe knights service. A woman hath seven ages for severall purposes appointed to her by law: as, seven yeares for the lord to have aid *pur file marier*; nine yeares to deserve dower; twelve yeares to consent to mariage; until fourteene yeares to be in ward; fourteene yeares to be out of ward if she attained thereunto in the life of her ancestor; sixteene yeares for to tender her mariage if she were under the age of fourteene at the death of her ancestor; and one and twenty yeares to alienate her lands goods and chattells.

A man also by the law for severall purposes hath divers ages assigned unto him, viz. twelve yeares to take the oath of allegiance in the torne or leet; fourteene yeares to consent to mariage; fourteene yeares for the heire in focage to choose his gardian, and fourteene yeares is also accounted his age of discretion; fifteene yeares for the lord to have aid *pur faire fitz chivaler*; under one and twenty to be in ward to the lord by knights service; under fourteene to be in ward to gardian in focage; fourteene to be out of ward of gardian in focage; and one and twenty to be out of ward of gardian in chivalrie, and to alien his lands goods and chattells.

“*Mes si tiel heire female soit deins l'age de 14 ans et nient marie, &c. le seignior avera la gard del terre.*” But put case that the lord cannot have the wardship of the land, as if the lord before the age of fourteene granteth over the wardship of the body, in this case the grantee of the body cannot enjoy the benefit of the two yeares, because he cannot hold over the land, and the lord which hath the wardship of the land only should lose the benefit of the two years, because he hath the lands onely, and cannot tender any mariage; therefore in this case the heire female shall enter into her land at her age of 14 yeares. So if a tenant holdeth of one lord by priority, and of another by posteriority, and dieth, his heire female within the age of 14 yeares, the lord by posteriority shall have the lands but untill her age of 14 yeares, because the mariage belongeth not to him. Also if the lord marieth the heire female within the two yeares, her husband and she shall presently enter into the lands: for, *cessante causa, cessat effectus; et cessante ratione legis, cessat beneficium legis.*

If the lord tender a convenable mariage to the heire within the two yeares, and she mary elsewhere within those two yeares, the lord shall not have the forfeiture of the mariage; for the statute giveth the two yeares onely to make a tender.

“*Et si le seignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine del dits 2 ans poest entrer, et ouste le seignior.*” This is so evident, as it needeth no explication.

“*Mes si tiel heire female soit marie deins l'age de 14 ans en la vie son ancestor, et son ancestor devie el esteant deins age de 14 ans, le seignior n'avera la gard forsque de la terre jesque al age de 14 ans, &c.*” Note, albeit the heire female be married at the age of twelve yeares in the life of her ancestor, (at which age she may consent to matrimony) to a man of full age, that is able to doe knights service, yet if the ancestor die before her age of fourteene, the gardian shall have

35 H. 6. 40.
Bracton, lib. 2.
cap. 37.
(1. Ro. Ab. 342.
6. Co. 73. b.)

34. E. 1. Stat. 3.
Glanvil. lib. 7.
cap. 9. Dier 5.
Marie 162.
Bracton, lib. 2.
cap. 37.
F. N. B. 202.
(1. Ro. Ab. 137,
138.)

35. H. 6. 52.
tit. Gard. 71.
Stanford. 3. b.
F. N. B. 256. 253.
35. H. 6. 40.

Britton, fol. 169.
35. H. 6. 52.

35. H. 6. 52.
35. H. 6. tit.
Gard. 71.
6. Co. 71. the
lord Darcie's
case.

F. N. B. 143.

have the land untill her age of fourteene, because (as hath beene said) that is the time appointed by the common law. And so if the heire male be married in the life of the ancestor at his age of fourteene yeares, and the ancestor dieth, the lord shall have the land untill the ward commeth to the age of one and twenty.

“ Car ceo est hors del case del dit statute, intant que le seignior ne poet tender mariage a luy que est marie.”

Natura non facit vacuum, nec lex supervacuum. The law doth never enforce a man to doe a vaine thing.

And where the said statute of *W. 1.* giveth unto the lord the said two yeares, thereby is implied, that if he dyeth within the two yeares, his executors or administrators shall have the same. For when the statute vesteth an interest in the lord, the law giveth the same to his executors or administrators. Then put case, that a lord hath the wardship of the bodie and land of an heire female, and maketh his executor, and dyeth before her age of fourteene yeares; whether the executor shall have the two yeares, because the executor is not lord. But I take it, the executor having the wardship of the body and land, shall in that case have the two yeares, for that they were vested in the lord (1).

It is further provided by the said statute, that if the lord tender a convenable marriage to the heire female within the said two yeares, and the heire female refuseth, then the lord shall hold the land untill her age of one and twenty yeares, and further untill he hath levied the value of her marriage. But if the lord doth not tender a marriage within the two yeares, he shall lose the value of the marriage, and content himselfe with the two yeares value.

“ Car devant le dit statute, &c. sicome appiert per le rehearsall et parols de le dit statute.” *Nota*, the rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof (2). The tender of a marriage to an heire female before the age of fourteene is void, which must be understood where the lord may hold the land for the said two yeares, for then the statute appointeth the time of the tender; but where the lord cannot have the two yeares, he may tender a marriage to the heire female at any time after the age of twelve and before fourteene, for so he might have done at the common law.

Sect. 104.

NO T A, que le pleine age de male et female, selonque le common parlance, est dit l'age de 21 ans. Et l'age de discretion est dit l'age de 14 ans; car a tiel age, le enfant que est marie deins tiel age a un feme, puit agréer a tiel mariage ou disagreer.

NO T E, that the full age of male and female, according to common speech, is said the age of 21 yeares. And the age of discretion is called the age of 14 yeares; for at this age, the infant which is married within such age to a woman, may agree or disagree to such marriage.

OF

(1) See 6. Co. 74. a.

(2) [See Note 42.]

27. H. 8. 3.
11. E. 3.
Exec. 77.
4. E. 3. 55.
28. Aff. p. 7.

31. Aff. p. 26.
(Cro. Jam. 151.)

6. Co. 71. L.
Darcie's case.

35. H. 6. 52.
Gard. 71.

35. H. 6. 52.
Gard. 71.
6. Co. 71. lord.
Darcie's case.
Britton 169.

OF full age, which is the age of one and twenty, and of the age of discretion, which is the age of fourteene (3), somewhat hath beene spoken before (4). But now to the point of agreement or disagreement in this case. The time of agreement, or disagreement, when they marrie *infra annos nobiles*, is for the woman at 12 or after, and for the man at fourteene or after, and there need no new mariage, if they so agree; but disagree they can not before the said ages, and then they may disagree, and marie againe to others without any divorce; and if they once after give consent, they can never disagree after (1). If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may aswell disagree as she may, though he were of the age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both; and so *à converso*, if the woman be of the age of consent, and the man under (2).

(Ante 78. b.)

5. Mar. Gard.

Br. Pl. ultimo.

39. E. 3. 32, 33.

Præ. Reg. c. 6.

Tr. 24. Eliz.

Rot. 842. in

bank le roy

Banister's case.

(1. Ro. Abr. 341.

3. Inst. 89.)

Sect. 105.

ET si le gardein en chivalrie marie un foits le garde deins l'age de 14 ans à un feme, et puis s'il al age de 14 ans disagree a le mariage, il est dit per ascuns, que l'enfant n'est pas tenuz per le ley d'estre autrefois marie per son gardeine, pur ceo que le gardeine avoit un foits le mariage de luy, et pur ceo il fuit hors de son garde quant al garde de son corps. Et quant il avoit un foits le mariage de luy, et un foits fuit hors de son garde, il n'avera plus avant le mariage de luy (3).

AND if the gardian in chivalrie doth once marie the ward within his age of 14 yeares to a woman, and if afterward at his age of 14 yeares he disagree to the mariage, it is said by some, that the infant is not tied by the law to be againe married by his gardian, for that the gardian had once the mariage of him, and because he was once out of his ward as to the ward of his bodie. And when he had once the mariage of him, and he was once out of his wardship, he shall no more have the mariage of him.

IT is a maxime in law, *Quòd dominus non maritabit minorem in custodia sua nisi semel*. And another faith, *Si semel legitimè nupt fuer', &c. postmodum non tenebuntur sub custodia dominorum esse*. Albeit this mariage is *de facto*, and not *de jure*, and though the disagreement dissolveth it *ab initio*, yet the lord shall never have the mariage of him.

13. E. 1.

Gard. 137.

Brit. fol. 169. acc.

Glanvil. lib. 7.

cap. 12.

27. H. 6. Gard.

118.

And so if the gardian marieth his ward to a woman, and after the mariage is dissolved by reason of a precontract (4), yet the gardian shall never have the mariage of the ward againe.

27. H. 6. Gard.

118.

But if one ravisheth a ward from the lord and marieth him within the age of consent; in that case, if the lord taketh again his ward, and he at the age of consent disagreeeth to the mariage, the lord shall have the mariage of him, for he never had it before.

27. H. 6. Gard.

118.

So

(3) [See Note 43.]

(4) To lord Coke's account of the several ages of a man and woman, which is given in fol. 78. b. add 1. Hal. Hist. Pl. C. 17.

[79. b.]

(1) [See Note 44.]

(2) [See Note 45.]

(3) In L. and M. the words *quare de hoc* are added.

(4) [See Note 46.]

Lib. 2. Cap. 4. Of Knights Service. Sect. 106.

F. N. B. 243.

7. H. 6. 11.

[a] 30. E. 1.

gard. 156.

12. E. 1.

gard. 138.

21. E. 3. 19.

20. E. 3.

gard. 41.

Temps E. 1.

ibidem 128.

35. H. 6. 45.

7. H. 6. 11.

Vide Prær.

Reg. cap. 6.

13. H. 3.

gard. 147.

Stanf. præf.

26, 27.

[b] 27. H. 6.

gard. 118.

F. N. B. 143. m.

19. E. 3. judgement 123. 45. E. 3. 16.

bookes abovefaid.

So likewise, if the ancestor marieth his heir apparent *infra annos nobiles*, and dieth his heir within age, the ward disagreeeth, the guardian shall have the wardship of him. The same law it is in the same case, if the wife dyeth before the age of consent, the lord shall have the marriage of the heir.

And so note a diversity when the ward is married by the ancestor or by a ravisher, and when by the guardian himselfe. [a] For if the ancestor marie his heir apparent *infra annos nobiles* and dyeth, in this case, if the marriage be dissolved by disagreement either of the ward or of his wife, the guardian shall have the marriage of him. [b] And so it is if a ravisher marry a ward *infra annos nobiles*, and the marriage is dissolved, *ut supra*, the guardian shall have the marriage. If the heir male in ward of the age of tenne yeares be married without the consent of the lord, he may tender unto the heir *infra annos nobiles* a marriage, albeit he be so married; and if he refuse, and agree to the former marriage, the lord shall have the forfeiture of his marriage, as it hath beene holden. But otherwise it is [c] (saith Littleton) where the guardian himselfe marieth the ward, *ut supra*. And the reason of the diversitie is, because in this case the guardian had once the marriage of him, but so had not he in either of the other cases; and it is a maxim in law, *quod dominus non maritabit pupillum nisi semel*.

[c] 47. E. 3. tit. Action sur le statute 38. and the

It appeareth upon consideration of all the bookes aforefaid, that where the ancestor marieth his heir apparent within the age of consent, and dyeth, the infant still being within the age of consent, the lord may take the infant (if he will) into his possession, in respect the infant may disagree to the marriage; and if the infant be deteyned from him, he shall recover him in a writ of ravishment of ward, and thereupon have the infant delivered to him. [d] But if the ancestor marieth his heir apparant *infra annos nobiles*, and dieth, his heir being *infra annos nobiles*, and after age of consent the heir agreeth to the marriage, neither the king nor the lord shall have the marriage, for now it is a marriage *ab initio*, and there neede no other marriage.

[80. a.]

Sect. 106.

EN mesme le manner est, si le gardein luy marie, et la feme devie, esteant l'enfant deins l'age de xiiii. ans ou xxi.

IN the same manner it is, if the guardian marry him, and the wife die, the infant being within the age of 14 yeares or 21.

THIS Littleton addeth, because he spake in the case next before of a disagreement by the infant. Here he saith, that if the wife dye, the infant being within the age of consent.

Sect. 107.

ET que tiel enfant poit disagreeer a tiel mariage, quant il vient al age dex iiii. ans, il est prouue per les parolx del statute de Merton cap. 6. que issint dit.

De dominis qui maritaverint illos quos habent in custodiâ suâ, villanis, vel aliis, sicut burgensibus, ubi disparagentur, si talis hæres fuerit infra 14 annos, et talis ætatis quod matrimonio consentire non possit, tunc si parentes illi conquerantur, dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem existentis, secundum dispositionem parentum, propter dedecus ei impositum. Si autem fuerit 14 ans et ultra, quod consentire possit et tali matrimonio consenserit, nulla sequatur pœna.

Et issint est prove per mesme le estatute, que nul disparagement est, mes lou celuy que est en garde est marie deins l'age de xiiii. ans.

AND that such infant may disagree to such marriage, when he comes to the age of 14 yeares, it is proved by the words of the statute of Merton cap. 6. which saith thus.

And so it is proved by the same statute, that there is no disparagement, but where he which is in ward is married within the age of 14 yeares.

"LE statute de Merton." So called because the parliament was holden at Merton.

"Et que tiel enfant poit disagreeer, &c. il est prove, &c." Note, the time of disagreement is set downe by act of parliament, and so observed by Littleton, who seekes no other prooffe therein then by the law of England.

Merton, ca. 6.

"Ubi disparagentur." Disparagement, *disparagatio*, commeth of the verbe *disparago*, and that of *dispar* and *ago*.

Now it is necessarie to be understood, what disparagements there be for the which the heire may refuse.

And of such disparagements there be foure kindes.

The first, *propter vitium animi*; as an ideot, *non compos mentis*, a lunatique, &c. (1)

The second, *propter vitium sanguinis*; as, 1. a villein: 2. *burgensis*: 3. the sonne or daughter of a person attainted of treason or felony, albeit pardoned, for the blood is corrupted: 4. a bastard: 5. an alien or the childe of an alien. *Burgensis* is a man of trade, as an haberdasher, a draper, or the like (and this agreeth with the civill law, *Patricii cum plebeiis matrimonia ne contrahant*), whereof Glanvill speaketh thus: *Si verò fuerit filius burgensis, ætatem habere tunc intelligitur, quando discretè sci-verit denarios numerare, et pannos ulnare, et alia paterna negotia similiter exercere.*

The third, *propter vitium corporis*; as, first, *de membris*, having but one hand, one foot, one eye, &c. secondly, deformitie; as to looke asquint, a creeple, halt, lame, decrepit, crooked, &c. thirdly, privation; as blind, deafe, dumbe, &c. fourthly, disease horrible; as leprosie, palsie, dropsie, or such like diseases; fifthly, great and continuall

Bracton, lib. 2. fol. 91.
Britton, fo. 169.
Fleta, lib. 1. cap. 12.
Mirror, ca. 2. sect. 17.
Rot. Parl. 18. E. 1. fo. 9.
The daughter of Nevil married to the sonne of Tho. of Weyland after his attainder.

continually infirmities; as a consumption, and such like: sixthly, impotency to have children in respect either of age past children, or so tender yeares as there is too great disparity, or for naturall disability or impediment, or such like: seventhly, deflowered of her virginity.

1. E. 6. cap. 12.

[d] Vide Sect.

109.

F. N. B. 149.

The fourth kinde of disparagement was *propter jacturam privilegii*, &c. as to marry the heire to a widow, whereby he should by reason of the bigamie have lost the benefit of his cleargie, whereby he might save his life; but now the exception of bigamie in that case is oulsted by the statute (1). And Littleton saith, [d] that there be many other disparagements which are not specified in the said statute, for those two mentioned are put but for examples. In a word, it must be *competens maritadium absque disparagacione*.

“*Si talis hæres fuerit infra 14 annos, et talis ætatis quod matrimonio consentire non possit, &c.*” Note, albeit the ward, where he is disparaged, may disagree at his age of fourteene yeares, yet the law doth so abhorre the odious dealing of the gardian, to whom the custody of the heire is committed, and his horrible profanation of honourable marriage, the only ligament of men’s inheritances, as it inflicteth a great punishment upon the lord in this case, albeit the marriage be not perfect, but avoydable by disagreement.

“*Tunc si parentis illi conquerantur.*” Littleton in the next Section expoundeth these words in this manner, viz. *Si parentes conquerantur, i. e. si parentes inter eos lamententur, quæ est tant a dire, que si les cosens de tiel infant ont cause de faire lamentation ou complainte pur le bont faire leur cosen issint disparage, quel est in manner un bont a eux. Parens est nomen generale ad omne genus cognationis.* See more of this in the next Section.

“*Dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis, &c.*” Here followeth the penaltie.

First, *amittat custodiam*, that is, the whole benefit of the wardship. But in this case if the gardian hath granted the wardship of the land to another *bonâ fide*, and after, the heire is disparaged, the grantee shall not forfeit his interest; for the statute is, *dominus amittat custodiam*.

Secondly, *et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis secundum dispositionem parentum*. These words are expounded by Littleton, which needeth no further explanation. Now where readers upon this statute have put a case, that if the tenant hath issue a daughter, his wife *enseint* with a sonne and dieth, the lord doth disparage the daughter before the age of twelve yeares, the sonne is borne, the daughter disagrees, the sonne dieth the daughter within the age of fourteene, she shall be in ward againe: This case is not warranted by this statute, for this statute extends not to the heires female.

If the tenant make a lease to *A.* for life, the remainder to *B.* in fee, the tenant for life surrenders upon condition, *B.* dieth his heire within age, the lord disparages the heire, tenant for life entreth for the condition broken and dieth, the heire shall be out of ward, for that

Vide the Second Part of the Institutes.

Merton, cap. 5, 6.

35. H. 6. 53.

(9. Co. 127.)

that he claimeth as heire to one man. But if after the disparagement lands descend from another ancestor to the ward so disparaged, he shall be in ward for those lands.

If two joyntenants be of a ward, and the one disparageth the heire, both shall lose the wardship, for the words be, *et omne commodum, &c.*

“*Si autem fuerit 14 annorum et ultra, &c. nulla sequatur pœna.*” Britton, fol. 169.
By which it appeareth (as Littleton observeth), that there is no disparagement but where the ward is married within the age of fourteene.

Sect. 108.

[81.a.]

NOTA, que il soloit estre question, coment ceux parolx ferront entendes, Si parentes conquerantur, &c. Et il semble a ascuns, que considerant le statute de Magna Charta, que voit, quod hæredes maritentur absque disparagatione, &c. sur quel cel statute de Merton sur tiel point est foundue (1), que nul action poit estre pris sur cel statute, (2) entant que il ne fuit unques view ne oye, que ascun action fuit port sur cel statute de Merton pur cel disparagement envers le gardeine pur cest matter avantdit (3), &c. et si ascun action puisse estre prise sur tiel matter, il serra entendue ascun foits (4) estre mise en ure. Et nota (5) que ceux parolx ferront entendes (6), Si parentes conquerantur, id est, si parentes inter eos lamententur que (7) est taunt a dire, que si les cousins de tiel enfant ont cause de faire lamentation ou complaint enter eux, pur le hont fait a leur cousin issint disparage, quel est en maner un hont a eux, donques puit le prochein cousine, a que l'enheritage ne puit discender, enter et ouster le gardeine en chivalrie. Et s'il ne voile, un autre cousin del enfant poit ceo faire, et les issues et profits prender al use del enfant, et

NOTE, it hath beene a question, how these words shall be understood (*Si parentes conquerantur*). And it seemeth to some, who considering the statute of *Magna Charta*, which willeth, quod hæredes maritentur absque disparagatione, &c. upon which this statute of *Merton* upon this point is founded, that no action can be brought upon this statute, insomuch as it was never seene or heard, that any action was brought upon the statute of *Merton* for this disparagement against the gardian for the matter aforesaid, &c. and if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in ure. And note that these words shall be understood thus, *Si parentes conquerantur, id est, si parentes inter eos lamententur*, which is as much as to say, as if the cousins of such infant have cause to make lamentation or complaint amongst themselves, for the shame done to their cousin so disparaged, which in manner is a shame to them, then may the next cousin, to whom the inheritance cannot descend, enter and ouste the gardein in chivalrie. And if

(1) que nul action poit estre pris sur cel statute, not in L. and M.

(2) come semble et, L. and M.

(3) per cest matter avant dit, not in L. and M.

(4) per comen presumption devaunt ceux

heurez instead of entendue ascun foits, in L. and M.

(5) Et nota not in L. and M.

(6) en tiel maner in L. and M.

(7) ou instead of que in L. and M.

et de ceo render accompt al enfant quant il vient a son plein age. Ou autrement l'enfant deins age poit enter luy mesme, et ouster le gardein, &c. Sed quære de hoc.

if he will not, another cousin of the infant may doe this, and take the issues and profits to the use of the infant, and of this to render an account to the infant when he comes to his full age. Or otherwise the infant within age may enter himselfe, and ouste the gardein, &c. *Sed quære de hoc.*

9. H. 3.
(2. Inst. 1.)

Vide 8. Co. the
Prince's case.

“ *LE statute de Magna Charta.*”

Though it be in forme of a charter, yet being granted by assent and authoritie of parliament *Littleton* here saith it is a statute.

This parliamentarie charter hath divers appellations in law. Here it is called *Magna Charta*, not for the length or largenesse of it, (for it is but short in respect of the charters granted of private things to private persons now a dayes being (*elephantinæ chartæ*), but it is called the great charter in respect of the great weightinesse and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme; and therefore it may truly be said of it, that it is *magnum in parvo*. It is in our bookes called *Charta Libertatum, et Communis Libertas Angliæ*, or *Libertates Angliæ*, *Charta de Libertatibus*, *Magna Charta*, &c. And well may the lawes of England be called *Libertates, quia Liberos faciunt*. *Magna fuit quondam Magnæ reverentia Chartæ.*

Bracton, 414.
and 291.

Fleta, lib. 2.

cap. 48. & lib. 3.

cap. 3.

Mirror, cap. 2. sect. 18. Brit. fol. 177. b.

This statute of *Magna Charta* is but a confirmation or restitution of the common law, as in the statute called *Confirmatio Chartarum anno 25. E. 1.* it appeareth by the opinion of all the justices; and in 5. H. 3. tit. Mord. 53. *Magna Charta* is there vouched; for there it appeareth that king *John* had granted the like charter of renovation of the ancient lawes.

This statute of *Magna Charta* hath beene confirmed above thirty times, and commanded to be put in execution. By the statute of 25. E. 1. cap. 2. judgements given against any points of the charters of *Magna Charta*, or *Charta de Foresta*, are adjudged void. And by the statute of 42. E. 3. c. 1. if any statute be made against either of these charters it shall be void.

25. E. 1.

5. H. 3. Mord. 53.

Matth. Paris,

246. 276. 248.

25. E. 1. ca. 2.

42. E. 3. ca. 1.

“ *Sur le statute de Magna Charta le statute de Merton est foundue sur tiel point, viz. Quod hæredes maritentur absque disparagacione (1).*”

[81. b.]

“ *Foundue.*” So as *Magna Charta* is the foundation of other acts of parliament. This act extendeth as well to females as to males.

“ *Nul action poit estre prise sur cel statute, entant que il ne unques fuit view ou oye, &c. Et si ascun action puiſſoit estre prise sur cest matter, il serra intend a ascun foits estre mise in ure.*”

Hereby

(1) See 9. Hen. 3. c. 6.

Hereby it appeareth how safe it is to be guided by judicial presidents, the rule being good, *Periculosum existimo, quod bonorum virorum non comprobatur exemplo*. And as usage is a good interpreter of lawes, so non usage where there is no example is a great intendment that the law will not beare it; for, saith *Littleton*, if any action might have beene grounded upon such matter, it shall be intended, that sometime it should have been put *in ure* (2). Not that an act of parliament by non user can be antiquated or lose his force, but that it may be expounded or declared how the act is to be understood.

Vide Petitiones coram domino rege in Parlamento, fol. 3. 18. E. 1. 39. H. 6. 39. per Ashton. 6. Eliz. Dier 229. (Ante 11. a.) 23. Eliz. Dier. Nullum breve de errore de iudicio in 5. port.

quia nullum breve repetitur. 3. E. 3. 50. 11. H. 4. 7. and 38. Vide le statute de Marlebridge, cap. 27. In custodia parentum.

“*Si parentes conquerantur.*” Of this sufficient hath beene said before.

“*Si les cousins.*” Here *Littleton* expoundeth parents to be his cousins, under which name of cousins *Littleton* includeth uncles and other cousins, who when the father is dead are *in loco parentum*.

“*Ont cause a faire lamentation, &c.*” Note, if they have cause to make lamentation, it sufficeth, though they never complaine.

“*Pur le bont fait a lour cousin.*” For when their cousin is disparaged in his marriage, it is not only a shame and infamie to the heire, but in him, to all his bloud and kindred.

“*Donques poit le procheine cousin, a que le enheritance ne poit descend, enter et ouster le gardein in chivalrie.*”

This is worthy the observation, for the words of the statute are generall, *secundum dispositionem parentum*, and the construction thereof shall be according to the reason of the common law; for the next cousin, to whom the inheritance cannot descend, shall enter and ouste the gardian, and shall be in place of a gardian, as it is in case of a gardian in focage.

“*Et s'il ne voile, un autre cousin del enfant poit ceo faire.*” Still pursuing the reason of the common law in case of gardian in focage.

“*Et les issues et profits prender al use del enfant, &c.*” This is so evident as it needeth no explication.

“*Ou autrement l'enfant deins age poit enter luy mesme et ouste le gardein.*” If none of the cousins aforesaid will enter, then the heire himself may enter; in all which the reason of the common law is pursued. But what if the heire be disparaged, and the next of kin doth enter, and when the heire commeth to 14 he agreeth to the marriage; yet shall not this give any advantage to the lord, for that he had lost the wardship before.

(2) [See Note 49.]

Sect. 109.

[82. a.]

ITEM, mults auters divers disparagements y sont, que ne sont specifies en mesme le statute. Come si le heire que est en gard est marry a un que n'ad forsque un pee, ou forsque un maine, ou que est deforme, decrepite, ou ayant horrible disease, ou graund et continual infirmitie; et (si soit heire male) si soit marry a feme que est passe l'age d'enfanter. Et mults auters causes de disparagements sont; sed de illis quære, car il est bon matter d'apprendre.

ALSO, there be many and divers other disparagements, which are (Ante 80. a.) not specified in the same statute. As if the heire which is in ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having some horrible disease, or great and continually infirmitie; and (if he be an heire male) if he be married to a woman past the age of childe-bearing. And there be other causes of disparagement; but inquire of them, for it is a good matter to understand.

Of this sufficient hath been said before.

Sect. 110.

ET des heires males que sont deins l'age de 21 ans apres le mort leur ancestor nient marries, en tiel cas le seignior avera le mariage de tiel heire, et avera temps et space de tender a luy convenable mariage sans disparagement deins meme le temps de 21 ans. Et est ascavoir, que l'heire en tiel case poit eslier s'il voit estre marry ou non; mes si le seignior, que est appel gardein en chivalry a tiel heire, tender convenable mariage deins l'age de 21 ans sans disparagement, et l'heire ceo refuse, et ne soy marie deyns le dit age, donques le gardeine avera le value del mariage del tiel heire male. Mes si tiel heire luy meme marie deins l'age de 21 ans encounter la volunt le gardeine en chivalrie, donquez le gardein avera le double value del mariage per force de le statute de Merton avantdit, come en meme le statute est comprise puis a pleine.

AND of heires males which be within the age of 21 yeares after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heire, and he shall have time and space to tender to him covenantable marriage without disparagement within the said time of 21 yeares. And it is to be understood, that the heire in this case may chuse whether he will be married or no; but if the lord, which is called guardian in chivalry, tenders to such heire covenantable marriage within the age of 21 yeares without disparagement, and the heire refuseth this, and doth not marrie himselfe within the said age, then the gardein shall have the value of the marriage of such heire male. But if such heire marrieth himself within the age of 21 yeares against the will of the gardein in chivalrie, then the gardein shall have

the double value of the marriage by force of the statute of *Merton* aforesaid, as in the same statute is more fully at large comprised.

“*DE tender a luy convenable marriage, &c.*” But it is in the election of the lord, whether for the single value the lord will tender a marriage or no, for he shall have the single value without any tender (1).

And of this there needeth no other explication. The value of the marriage of such an heire is according to the valuation by lawfull triall, or as much as another had before offered to give for the same without fraud and covyn.

6. Co. 70. Lo.
Darcie's case.
Vid. Britton,
fol. 169.
(5. Co. 127.)

Merton, cap. 6.
18. E. 3. 18.

“*Le heire en tiel case poit eslier s'il voit estre marrie, ou non, &c.*” And so on the other side, though there be a tender made of a convenient marriage without disparagement, yet the heire may refuse, for in everie marriage there must be a free consent.

[82. b.]

“*Si tiel heire.*” That is, if such an heire to whom a tender hath been made by the lord, and by whom a refusall hath beene made; if such an heire afterwards marieth another within age, he shall forfeit double the value; but if he before any tender marieth himselfe within age, he shall pay but the single value of the marriage.

Neither the single value nor the double value shall be recovered against the heire but after his full age; but for both these the lord hath a double remedie, viz. an action, as is aforesaid; or the lord may retaine the land after full age for his satisfaction of both, with this difference, that in the case of the single value the taking of the profits shall not be accounted parcell of the value, but as a gage or pledge till the heire do satisfy him of the single value; but in case of the double value, the perception of the profits shall be taken in satisfaction of the double value; for the statute of *Merton*, which giveth the forfeiture, saith, *Dominus teneat terram, &c. per tantum tempus quod inde percipere possit duplicem valorem maritagii*: which words (*quod inde, &c.*) prove that the taking of the profits shall go in satisfaction: but in case of the single value, untill the heire doth satisfy the lord of the same.

No forfeiture of marriage is given, by the said statute of *Merton*, of an heire female, as appeareth by the said act; neither at the common law could the lord have holden the land of the heire female after fourteene yeares for the value.

Stat. de Merton,
cap. 6. 2. E. 2.
acc. sur l'estat.
43. 3. E. 2.
ibid. 27.
16. E. 3.
ibid. 14.
18. E. 3. 18.
Temps E. 1.
acc. sur l'estat.
43. E. 3. 21.
27. H. 8. 4.
Statute de Mer-
ton, cap. 7.
35. H. 6. tit.
Gard. 71.

6. Co. 71. Lord Darcie's case.

Sect. III.

ITEM, divers tenants teignent de leur seigniors per service de chivaler, et uncore ils ne teignent per escuage, ne paieront escuage; come ceux que teignent de leur seigniors per castle-garde, c'est-ascavoir, a garder un tower del castle leur seignior, ou un huis ou un auter lieu

ALSO, divers tenants hold of their lords by knights service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a doore or some other place

(1) This point, which before lord Coke's time appears to have been doubtful, was adjudged in the case of *Palmer and Wilder*,

and again in lord Darcie's case. See the former case in 5. Co. 126. b. and the latter in 6. Co. 70. b.

lieu del castle, per reasonable garnishment, quant lour seigniors oyont, que enemies voylent vener, ou sont venues en Engleterre. Et en plusors auters cafes home poit tener per service de chivaler, et uncore il ne tient per escuage, ne payera escuage, sicome serra dit en le tenure per graund serjeantie. Mes en tous cafes ou home tient per service de chivaler, tiel service trait all seignior gard et mariage.

place of the castle, upon reasonable warning, when their lords heare that the enemies will come, or are come in England. And in many other cafes a man may hold by knight's service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeantie. But in all cafes where a man holds by knight's service, this service draweth to the lord ward and marriage.

4. Co. 88. in
Luttrell's case.
6. Co. 20. a.
Gregorie's case.
29. R. 2.
Gard. 195.

“*PER castel-gard, wardum castri, seu castel-gardum, seu castri-gardum.*” He that holdeth by castle-gard, holdeth by knight's service, but not by escuage; for escuage is due when the king maketh a voyage royall out of the realme (as hath beene said) and the tenant maketh default; but castle-gard is to be done within the realme, and without any voyage royall.

Also a certaine tearme is appointed for the service of the tenant that holdeth by escuage, but no certaine tearme by law for him that holdeth by castle-gard. *Vide* in the title of Grand Serjeantie, Sect. Hereof come *castellani*, or *constabularii castri*, for keepers

Vide Mag.
Chart. cap. 19.
20. W. 1. cap. 7.
Bract. lib. 5. fol. 363.

Fleta, lib. 2. cap. 43.

[83. a.]

Magna Chart.
cap. 20.

“*A garder un tower del castle, &c.*” A tower, or a doore, or a bridge, or a sconce, or some other certaine part of the castle; for the tenure must be certaine. And this may be done by the tenant himselfe or his deputie.

(2. Ro. Abr.
513)

[a] Temps E. 2.
tit. Aff. 399.
31. E. 1. tit.
Aff. 441.
[b] 17. E. 3.
65. 72.
4. E. 3. 42.
[c] 4. Co. 88.
Luttrell's case.
3. H. 8.
Bendloe's and
Capel's case.
4. E. 3. 55.

“*Del seignior.*” For it cannot be of a castle of another.

Lord and tenant by castle-gard, the lord granteth over his seigniorie to another, [a] the castle gard is gone, because the grantee hath not the castle. [b] For the same reason it is, that if one holdeth of me, as of my manor of *D.* by fealtie and suit of court, if I grant over the services of this tenant, the suit is gone, because the grantee hath not the manor. [c] But if the castle be wholly ruinated, *si castrum sit penitus dirutum*, yet the tenure remaineth by knight's service, and it goeth in benefit of the tenant, as to the garding of the castle, untill it be reedified. But ward and marriage belongeth to the lord in the meane time. For *Littleton* in the end of this Section putteth it for a generall rule in all cafes where a man holdeth by knight's service, it draweth ward and marriage.

If the tenant make default in garding of the castle, the lord may distreine for it, and recover satisfaction in damages.

“*Per reasonable garnishment.*” This warning must be given by the lord or some other for him, and the tenant need not to stirre untill he have such warning.

“*Enemies.*” Which is to be understood of any manner of enemies whatsoever. And though *Littleton* speakes of enemies, yet it seemeth that to keep a castle in time of insurrection and rebellion (albeit in proprietic of speech rebels are no enemies) is a tenure by knight's service. *Vide* Hill. 8. E. 1. Midd. Rott. 86.

“*Voylent*

“*Voylent vener.*” For preparation is to be made upon warning before the enemy be come indeed into *England*. This appeareth to be in time of hostility and warre, or for preparation therefore. But a tenure to keepe a castle in time of peace only is no knight’s service.

If the tenant by castle-gard doe serve the king in his warre, he shall be discharged against the lord, according to the quantitie of the time that he was in the king’s host. (2. Ro. Abr. 505.)

Fleta speaketh of an old word called *wardwite*, and (saith he) *Fleta*, lib. 1. cap. 42. *significat quietanciam misericordie, in casu quo non invenerit quis hominem ad wardam faciendam in castro.*

Sect. 112.

ET si un tenant, que tient de son seignior per service de entier fee de chivaler, morust, son heire donques esteant de plein age, scil. de 21 ans, donque le seignior avera 100s. pur reliefe, et del heire celuy que tient per le moitie d’un fee de chivaler, 50s. et de celuy que tient per le quart part de fee d’un chivaler, 25s. et sic que plus, plus, et que meins, meins.

AND if a tenant which holdeth of his lord by the service of a whole knight’s fee, dieth, his heire then being of full age, *scil.* of 21 yeares, then the lord shall have 100s. for a reliefe, and of the heire of him which holds by the moitie of a knight’s fee, 50s. and of him which holds by the fourth part of a knight’s fee 25s. and so he which holds more, more, and which lesse, lesse.

“*RELIEFE, relevium.*” This word is derived from the originall before (1).

Vide Sect. 103.

[83. b.]

Nota, Reliefe [a] is no service, but an improvement of the service, or an incident to the service (2), for the which the lord may distreine (3), but cannot have an action of debt (4), but his executors or administrators may have an action of debt, and cannot distreine (1).

[a] Temps E. 1.

Reliefe 13.

41. E. 3. 22.

4. E. 2.

Avowrie 210.

7. H. 6. 13.

Ante 47. b.)

22. H. 8. Rot. 528. 34. E. 1. Avowrie 233. (3. Co. 66.

And it [b] is to be understood, that *feodum militis*, a knight’s fee, consisteth of twentieth pound land (2), and he payeth for his reliefe for a whole knight’s fee the fourth part of his fee, *viz.* five pound, and so according to the rate.

[b] Stat. del 1. E. 2. de militibus. Vide 9. Co. 124. Anth. Lowe’s case.

(2. Inst. 596.

Ante 69. b.)

Baronia, a baronie, or a baron’s fee, consisteth of thirteene knights fees and the third part of a knight’s fee (3), which amounteth to foure hundred markes *per annum*; and the baron for an entire baronie payeth for his reliefe an hundred markes, which is the fourth part of the value of his baronie.

Comitatus,

(1) [See Note 50.]

(2) [See Note 51.]

(3) [See Note 52.]

(4) Acc. ante 47. b. But there are some opinions to the contrary. See 2. Leon. 179. 2. Ro. Rep. 371.

[83. b.]

(1) S. p. acc. ante 47. b. post. 162. b. and 1. Show. 36.

(2) See ante 69. a. and note 3. there.

(3) As to this notion of there being a certain number of knights fees in a barony and earldom, see ante 69. a. note 5.

Comitatus, an earledome, or an earle's fee, consisteth of a baronie, and the third part of a baronie, which includeth twenty knights fees, amounting to foure hundred pound land *per annum*, and he payeth for his reliefe for an entire earledome the fourth part of his revenue, and that is an hundred pound. All which appeareth by the statute of *Magna Charta*, cap. 2. made in the ninth yeare of *Henrie* the third, at which time there was neither duke, marquisse nor viscount in *England*, as before is said. But there be precedents in the exchequer, that a dukedome consisteth of two earledomes, viz. eight hundred pound land by the yeare, payeth two hundred pound, and a marquisse consisteth of two baronies, viz. eight hundred markes land *per annum*, and of an earledome and a halfe, payeth two hundred markes for his reliefe. What the viscount should pay in certaine I have not heard. Before the making of the statute of *Magna Charta* the king had *rationabile relevium* of noblemen, and it was not reduced to any certaintie. (4), yet ought it to have been reasonable and not excessive.

(2. Ro. Abr.
516.)

Glanvil. lib. 9.
cap. 4. 6. Brac-
ton, lib. 2. fol. 83.
Britton, fol. 178.
Ockam, 42.
F. N. B. 83. 256.
Fleta, lib. 3. cap. 17.

Magna Charta, cap. 2.

I have seene the record of a charter made in 20. *H. 6.* to *Henrie Beauchampe* earle of *Warwicke*, whereby he was created king of the Ile of *Wight*, to him and the heirs males of his bodie. His reliefe was incertaine, and not limited by the statute of *Magna Charta*.

Vide *Bracton*,
fol. 84.

14. *H. 4.* in
recordo longo.
10. *H. 7.* 19.

20. *E. 3.* Ass. 122. tit. Avowrie 126. 13. Ass. pl. ultimo. 23. *E. 3.* 8.

It is to be observed, that the words of the statute of *Magna Charta* be, *hæres comitis de comitatu integro, et hæres baroniâ integrâ, &c.* Now what an entire earledome entire baronie is, hath beene declared before.

It is also to be observed, that at and before the statute of *Magna Charta* all earledomes and baronies were derived from the crowne, and were holden of the king *in capite*, and the king would not suffer them to be divided, or severed. And such entire earledomes and entire baronies are within the statute, but at this day earles and barons are without such earledomes and baronies of the king's gift in chiefe. For at the creation of an earle, he hath sometimes an annuities granted unto him (5), and sometimes nothing; so as such earles and barons so created are cleerely out of the statute of *Magna Charta*, and are to pay such relieves as other men that hold of the king *in capite*. For as the heire of a knight shall not pay reliefe, unlesse he hath a knight's fee, &c. so neither the earle nor baron shall pay any reliefe by this statute, unlesse he hath an earledome, &c. or baronie, &c.

16. *E. 3.*
Eschange 2.
46. *E. 3.*
Forfeiture 18.

24. *E. 3.* 24.
26. *H. 8.*
32. *H. 8.* ca. 2.
in fine.

"*Son heire de pleine age, scil. de 21 ans.*" And yet in some case the heire shall pay reliefe when he was within age at the time of the death of his ancestor. As if a man holdeth lands of the king by knight's service *in capite*, and of a common person other lands by knight's service, and dieth his heire being within age, the king hath all in ward by his prerogative untill the full age of the heire. In this case the heire shall pay reliefe to the other lord, for that the king had the wardship of bodie and lands. And the lord upon everie descent ought to have either wardship or reliefe.

But

(4) See 2. Inst. 7, 8. and Wright's Ten. 99. (5) [See Note 53.]

But if there be lord and tenant by knight's service, and the tenant dieth his heire being within age, the lord wayveth his wardship, as he may, and taketh himselfe to his feignorie; in this case the lord shall not have reliefe at his full age, because he might have had the wardship of the bodie and land. Lord and tenant of two manors by divers tenures by knight's service, the tenant is disseised of the one, and the disseisor dieth seised, and the tenant dieth seised of the other, his heire within age, the lord seised the body and lands of that manor, and after the heire at his full age recovereth the other manor against the heire of the disseisor, he shall pay reliefe for that manor, and so one lord of the heire of one tenant shall have both wardship during his minoritie and reliefe at his full age.

1. E. 3. 6.
Pl. Com. 229.
33. E. 3. tit.
Gard. Statham.

[84. a.]

“*Son heire.*” [k] And yet the successor of a bishop or abbot may pay reliefe by prescription or grant.

[k] 3. E. 5. 13.
76. 8. R. 2.
Reliefe 14.

3. H. 4. 2. 2. H. 3. Avowrie 124.

If the tenant infeofeth his heire apparent by collusion, and dieth [l] his heire of full age, it is a question in our bookes, whether he shall have reliefe either by the common law, or by the statute of *Marlebridge*, ca. 6. But now the statute [m] of 13. *Eliz.* ca. 5. hath cleered that question, and that the lord shall have reliefe where the conveyance is made to any person by collusion, &c.

[l] 39. E. 3.
tit. Reliefe.
24. E. 3.
Reliefe 11.
Brafton, lib. 2.
85.

[m] 13. *Eliz.* cap. 5.

Sect. 113.

ITEM, *home puit tenere son terre de son seignior per le service de deux fees de chivaler; et donque l'heire, esteant de pleine age al temps de mort son auncester, paiera a son seignior x.l. pur reliefe.*

ALSO, a man may hold his land of his lord by the service of two knights fees; and then the heire, being of full age at the time of the death of his ancestor, shall pay to his lord x. pound for reliefe (1).

This is evident, and needeth no explanation.

Sect. 114.

NOTA, *si soit aiel pier et fits, et la mere morust vivant le pier de le fits, et puis l'aiel, que tient la terre per service de chivaler, morust seisie, et sa terre descendist al fits la mere come heire al aiel, que est deins age; en cest cas le seignior avera le garde de la terre, mes nemy le garde del corps del heire, pur ceo que nul serra en garde de son corps a ascun*

NOTE, if there be grandfather father and sonne, and the mother dieth living the father of the sonne, and after the grandfather, which holds his land by knight's service, dieth seised, and his land descend to the sonne of the mother as heire to the grandfather, who is within age; in this case the lord shall have the wardship

(1) See further as to reliefs, post. 85. a. at the end of the note there, 90. b. 91. a. and b.

92. a. 93. a. 106. a. Wright's Ten. 97. and Vin. Abr. *Tenures*, E. a. to O. a.

a ascun seignior vivant son pier, pur ceo que le pier durant son vie avera le mariage de son heire apparant, et nemy le seignior. Auterment est, ou le pier est mort vivant la mere, lou le terre tenus en chivalrie descendist al firs de part son pier, &c.

ship of the land, but not of the bodie of the heire, because none shall be in ward of his bodie to any lord living his father, for the father during his life shall have the marriage of his heire apparent, and not the lord (2). Otherwise it is, where the father dieth living the mother, where the land holden in chivalrie descends to the son on the part of the father, &c.

Fleta, lib. 1.
cap. 5. 16. E. 3.
Disseisin 6.
31. E. 1. Gard.
154.
8. E. 2. Tresp.
235.
F. N. B. 243.

“**FITZ.**” Yet the father shall have the marriage of his daughter if she be his heire apparent; and *Littleton’s* reason extendeth to the daughter, for that (saith he) the father shall have the wardship of his heire apparent, within which words the daughter is included, so long as she continueth heire apparent.

Ambrosia Gorge’s case. 6. Co. 22.

“*Le seignior avera le gard del terre.*” Note, that albeit in this case the law doth give the custodie of the body to the father, and barreth the lord thereof, yet the lord shall have the wardship of the land by force of the tenure at the first creation thereof. And so it is if the father marieth his heire within age and dieth, yet the lord shall have the wardship of the land.

9. E. 2.
18. E. 3. 25.
29. Aff. 35.
29. E. 3. 37.
31. E. 3.
Bar. 237.
32. E. 3. Gard.
32.
30. E. 3. 17.
31. H. 6. 55.
12. H. 4. 16.
See W. 2. c. 35.

“*Vivant son pier.*” This doth not extend to any collaterall heire, but only to the sonne or daughter being heire apparent; for albeit a man shall have an action of trespassse, *quare consanguineum et hæredem caput*, and albeit the words be *cujus maritagium ad ipsum pertinet*, because the well bestowing of his heire apparent in marriage is a great establishment of his house, yet that is to be understood as against a wrong-doer, but not against a gardian in chivalrie, and the mother shall have the like writ for taking away of her sonne and heire apparent. And yet the mother shall not barre the lord by knight’s service of his wardship of the bodie, as *Littleton* here saith, * *quitamen ex filia tua nascitur in potestate tua non est, sed patris ejus.*

[84. b.]

F. N. B. 143. 31. E. 3. Br. 357. 9. E. 4. 53. * Vide Flet. lib. 1. cap. 6.

“*A ascun seignior.*” Put the case there is lord, *et feme* tenant by knight’s service of a carve of land, the *feme* maketh a feoffment in fee upon condition, and taketh the lord to husband, and hath issue a sonne, the wife dieth, the issue entreth for the condition broken, the lord entreth into the land as gardeine by knight’s service, and maketh his executors, and dieth; in this case, the executors shall have the wardship of the land during the minority of the heire, but not the wardship of the body: for albeit the lord seemeth to have a double interest in the wardship of the bodie, one as lord, and another as father, yet as father, and not as lord, in judgement of law, he shall have the wardship of the bodie of his son and heire apparent, in respect of nature, which was before any wardship in respect of seignories by knight’s service began, and that wardship by reason of nature cannot be waived, and claime made in respect of the seignorie.

And

And the executors of the father shall not have such a wardship which the testator had as father, neither can such a wardship be forfeited by outlawrie, because it is due to the father in respect of privitie of nature.

(3. Co. 39. a.
Post. 88. b.)
33. H. 6. 55.
7. Co. 13. in
Calvin's case.
Vide Flet. lib. 1.
c. 12. §. Cum
Patr. de feodo,
&c.
(Ante 8. a.
2. Ro. Abr. 39.)

"*De son heire apparent.*" And therefore if the father be attainted of felonie, &c. then cannot the sonne or daughter be an heire apparent, because the blood is corrupted betweene them, and consequently in the life of the father his sonne in that case shall be in ward.

A woman seised of lands in fee holden by knight's service taketh husband an alien, and hath issue, and the wife dieth, the issue shall be in ward, and the father shall not have the custodie of him, for that in the eye of the law he is not his heire apparent, as *Littleton* here speaketh.

Sect. 115.

NOTA, si home soit seisie de terre que est tenu per service de chivalier, et fait feoffment en fee a son use, et morust seisie del use, son heire deins age, et nul volunt per luy declare, le seignior avera brieve de droit de gard de corps et del terre, sicome tenant ust devie seisie del demesne. Et si le heire soit de pleine age al temps del morant son ancestor, en tiel case il payera reliefe, sicome il fuisset seisie del demesne. Et c'est per le statute de anno 4. H. 7. cap. 17.

NOTE, if a man be seised of land which is holden by knight's service, and maketh a feoffment in fee to his own use, and dieth seised of the use, his heire within age, and no will declared by him, the lord shall have a writ of right of the wardship of the bodie and land, as if the tenant had died seised of the demesne. And if the heire bee of full age at the time of the decease of his ancestor, in this case he shall pay reliefe, as if he had been seised of the demesne. And this is by the statute of 4 H. 7. cap. 17.

This Section is in addition to *Littleton* (1), and therefore I passe it over; and the rather, for that the said statute of 4. H. 7. is become of no force, for that by the statute of 27. H. 8. cap. 10. all uses are transferred into possession.

[85. a.]

Sect. 116.

NOTA, il y ad gardein en droit en chivalrie, et gardein en fait en chivalrie. Gardein en droit en chivalrie est, lou le seignior per cause de son seignorie est seisie de gard de terres et del heyre, ut suprà. Gardein en fait en chivalrie est, lou en tiel case le

NOTE, there is gardian in right in chivalrie, and gardian in deede in chivalrie. Gardian in right in chivalrie is, where the lord by reason of his seigniorie is seised of the wardshippe of the lands and of the heyre, ut suprà. Gardian in deede in chivalrie is,

(1) It was first introduced in Red.

le seignieur apres son seisin graunt, per fayt ou sauns fayt, le gard des terres, ou del heire, ou d'ambideux, a un autre per force de quel grant le grauntee est en possession. Donque est le grauntee appel gardein en fait.

is, where in such case the lord after his seisin grants, by deed or without deede, the wardship of the lands, or of the heire, or of both, to another, by force of which grant the grauntee is in possession. Then is the grauntee called gardian *in fait*, or gardian in deed.

HERE *Littleton* divideth gardein in chivalrie into gardian in right, and gardian *in fait*. And this is evident, and needeth no explanation.

(2. Ro. Abr. 62.)

“*Per fait ou sans fait.*” Here *Littleton* affirmeth, that the wardship of the body may be granted over without deed; and herein note a diversity betweene an originall chattell of a thing that properly lyeth in grant, and a chattell derived out of a freehold of any thing that lyeth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee assigne it over without deed, because it is derived out of a freehold that lyeth in grant. But the wardship of the body is an original chattell during the minority derived out of no freehold; and therefore as the law createth it without deed, so it may be assigned over without deed.

12. E. 3. tit. Grant 59.

7. E. 3. 63.

26. E. 3. 65.

28. E. 3. 96.

14. E. 3. Act.

sur le stat. 17.

25. E. 3. 40.

31. E. 3.

Vouch. 5.

46. E. 3. 25.

20. E. 4. 16.

12. H. 4. 19. 5. H. 7. 17. 36. 22. El. Dyer 371. 35. H. 8. Br. tit. Grant 85.

36. H. 8. tit.

Grant B. 125.

22. H. 6. 34.

19. H. 6. 33.

(Post. 325. b.)

24. E. 3. 69, 70.

5. E. 3. 58.

43. E. 3. 15.

5. H. 7. 36.

24. H. 7. 16.

15. H. 8. 8.

Bract. 366. 368.

246. 43. E. 1. 6.

A corporation aggregate of many cannot make a lease for yeares without deed, in respect of the quality of the incorporation; but their lessee may assigne it over without deed.

If an advowson be holden by knight's service, and the tenant dieth his heire being within age, the lord cannot grant the wardship of the advowson without deed; because it is derived out of an inheritance that lyeth in grant, and passeth not by livery; for *jus præsentandi est incorporale*, and so (albeit there be diversity of opinion in our bookes) is the law taken at this day. (1)

246. 43. E. 1. 6. 5. H. 7. 37. 11. H. 6. 4. 6. H. 7. 3. 18. H. 8. 16. El. Dyer 323.

(1) [See Note 55.]

TENURE en socage est, lou le tenant tient de son seignior son tene-ment per certeine service pur tous maners de services, issint que les services ne sont pas services de chyvaler. Sicome lou home tient son terre de son seignior per fealtie et per certeine rent, pur tous maners de services; ou lou home tient per homage et fealtie et certeine rent, pur tous maners de services; ou lou il tient per homage et fealty pur tous maners de services; car homage per soy ne fait pas service de chivaler.

TENURE in socage is, where the tenant holdeth of his lord the tenancie by certeine service for all manner of services, so that the service be not knights service. As where a man holdeth his land of his lord by fealty and certaine rent, for all manner of services; or else where a man holdeth his land by homage, fealty, and certaine rent, for all manner of services; or where a man holdeth his land by homage and fealty for all manner of services; for homage by itselfe maketh not knights service.

“**T**ENURE in socage (1).”

Agriculture or tillage is of great account in law, as being very profitable for the common wealth, wherein the goodnesse of the habit is best knowne by the privation; for by laying of lands used in tilth to pasture, six maine inconveniences do daily encrease. First, idlenesse, which is the ground and beginning of all mischiefs. 2. Depopulation, and decay of townes; for where in some townes 200 persons were occupied, and lived by their lawful labors, by converting of tillage into pasture, there have beene maintained but two or three heardsmen; and where men have beene accounted sheepe of God's pasture, now become sheep men of these pastures. 3. Husbandry, which is one of the greatest commodities of the realme, is decayed. 4. Churches are destroyed, and the service of God neglected by diminution of church livings (as by decay of tythes, &c.) 5. Injury and wrong is done to patrons and God's ministers. And 6. The defence of the land against forraine enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able, and patient of cold, heat, and hunger, than of any other.

The two consequents that follow of these inconveniences, are, first, the displeasure of Almighty God; and, secondly, the subversion of the polity and good government of the realm; and all this appeareth in our bookes. And the common law [a] giveth arrable land (which anciently is called *hyde and gaine*) the preheminency and precedency before meadows, pastures, woods, mynes, and all other grounds whatsoever; and [*] *averia carucæ*, the beasts of the plough, have in some cases more priviledge than other cattell have. And amongst the *Romans* agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough; and it is said, that never prospered tillage better, than when the senators themselves plowed (such force hath the example of superiors) whereof three famous *Romanes* in their several kindes spake.

stat. 45. Temps E. 1. Avoury 230.

Omnium

Mirror, ca. 1. f. 3.

4. H. 7. ca. 19.
4. Co. Tiring-
ham's case. fo. 39.
and 4. H. 7.
ca. 12.

[a] 20. E. 3.
Admesurement
8. 14. Aff. 21.
24. E. 3. 25.
[*] Mirror.
Braeton, fo. 217.
Fleta, lib. 2.
ca. 41.
Regist. Orig. 97.
Ockam, 38, 39.
4. E. 3. 1. a.
18. E. 2. tit.
Action sur le

3. 16, 17.

(1) See Wright's Ten. 142. and 2. Blackst. Comment. 5th ed. 79.

Cic. lib. 1. Offic.

Omniū rerum, ex quibus aliquid exquiritur, nihil agriculturā melius, nihil uberius, nihil dulcius, nihil libero homine dignius.

Virgil. lib. 1.

Georg.

*O fortunatos nimium, sua si bona nōrint
Agricolas, quibus ipsa procul discordibus armis
Fundit humo facilem victum justissima tellus.*

Seneca in Epist.

Nullum laborem recusant manus, quæ ab aratro ad arma transferuntur, &c. fortior autem miles ex confragoso venit; sed ille unctus et nitidus in primo pulvere deficit. But now let us peruse our author's words.

“Socagium.” Littleton in this Chapter, Section 119. fetcheth this word from the originall. *Socagium idem est quod servitium focæ, et foca idem est quod caruca, s. un sōke ou un carue.* (1)

[86. a.]

Bracton, lib. 2.

fol. 77.

[b] Glanvil.

lib. 7. cap. 9. &

11. & lib. 9. ca. 4.

Fleta, lib. 1. ca. 8.

& lib. 3. ca. 14.

& 16.

Britton, fol. 164.

[c] Domesday,

Herefordsc.

Vid. devant,

Sect. 1. Sudru.

Wendeford.

Wescesterfc.

* Mich. 10. E. 3.

Coram rege Wilts

in Thesaur.

[d] For etimo-

logies vid. Sect.

95. 154. 164.

204. 234. 267,

268, &c.

[e] Fleta, lib. 3.

ca. 14.

Bracton, lib. 2.

cap. 16. Britton, fol. 164.

[f] Mirror,

ca. 2. sect. 18.

Fleta, ubi supra.

And Bracton agreeth herewith. *Dicitur socagium* (saith he) *à secco, et inde tenentes dicuntur socmanni*, [b] *èd quod deputati sunt tantummodo ad culturam.* And Benerth signifieth the service of the plough and cart. It is to be observed, that in the book of [c] *Domesday*, land holden by knight's service was called Tainland, and land holden by focage was called Reveland; which appeareth in that it is said there, *hæc terra fuit tempore regis Edwardi Tainland, sed postea conversa est in Reveland.* (2) And in that booke they that held in focage were called by severall names, as *Sochemanni*, or *Sokemanni*, which still continueth; sometimes * *Coleberti*, i. e. *qui tenent in liberum socagium per redditum*; and sometimes they are called *Radchenestres*, i. e. *liberi homines, qui tamen arabant, herciabant, falcabant, metebant, &c.* And here it appeareth how necessary it is, that words be fetched from their originals, and our author *est verus etymologus* both in this and in many other places in his [d] three bookes. And it is to be observed once for all, that the legall termination of (*agium*) in composition signifieth, service or duty; as, *homagium*, the service of the man; *escuagium*, *servitium scuti*; [e] *socagium*, *servitium focæ*; *hida-gium*, the duty to be paid for a hide or plough-land; and so of *cornagium*, *coragium*, *carnagium*, *cariagium*, *burgagium*, *villenagium*, and *guidagium*, (which one describeth thus) *quod datur alicui, ut tunc conducatur per loca alterius*, and the like.

“*Issint que les services [f] ne sont pas services de chivaler.*” And in the next Section he saith, and every tenure that is not a tenure in chivalry is a tenure in focage. *Ex donationibus autem feoda militaria, vel magnam serjeantiam non continentibus, oritur nobis quoddam nomen generale, quod est socagium.* Here Littleton speaketh of tenures of common persons; for grand serjeantie is not knight's service, and yet it is not a tenure in focage, as shall be said hereafter. Also here he meaneth temporall services, and not frankalmoigne, as by the examples he put is manifest, and as in his proper place shall appeare more at large. Also here Littleton speaketh of focage largely taken, and so called *ab effectu*; that is, all tenures that have the like effects and incidents belonging to them as focage hath, are termed tenures in focage, albeit originally service of the plough was not reserved. As if originally a rose, a pair of gilt spurs, a rent, and such like

(1) [See Note 56.]

(2) [See Note 57.]

like were reserved, or that the tenants *in condemnatos ultrices manus mittant, ut alios suspendio, alios membrorum detruncatione, &c. puniant*, these are said to be tenures in socage *ab effectu*, for that there shall be like gardein in socage, like reliefe, and such other effects and incidents as a tenure in socage hath, and are so termed to distinguish the same from knight's service. Nay, the worst tenure that I have read of, of this kind, is to hold lands to be *ultor sceleratorum condemnatorum, ut alios suspendio, alios membrorum detruncatione, vel aliis modis juxta quantitatem perpetrati sceleris puniat*, (that is) to be a hangman or executioner. It seemeth in ancient times such officers were not voluntaries, nor for lucre to be hired, unlesse they were bound thereunto by tenure. And so note, that some tenures in socage are named *à causâ*, and some, and the greater part, *ab effectu*.

Ockam, cap. quæ per solam consuetudinem, &c.

Ockam, fo. 31. a. & b.

“*Car homage de soy ne fait service de chivaler.*” But it is a presumption where homage is due, that the land is holden by knight's service, as hath beene said.

Sect. 118.

(4. Co. 8.)

ITEM, home poit tener de son seignior per fealty tantum, et tiel tenure est tenure en socage; car chescun tenure que n'est pas tenure in chivalry, est tenure en socage.

ALSO, a man may hold of his lord by fealty only, and such tenure is tenure in socage; for every tenure which is not tenure in chivalrie, is a tenure in socage.

Of this sufficient hath beene said before.

Sect. 119.

[86. b.]

ET il est dit, que la cause, pur que tiel tenure est dit et ad le nosme de tenure en socage, est ceo; quia focagium idem est quod servitium focæ, et foca idem est quod caruca, scil. un foke ou un carue. Et en ancient temps, devant le limitation de temps de memorie, grand part de les tenants, que tyendront de leur seigniors per socage, devoient venter ove leur fokes, chescun de les dits tenants pur certain jours per an pur arer et semer les demesnes le seignior. Et pur ceo que tielx overages fueront fait pur le viver et sustenance de leur seigniors, ils fueront quits envers leur seigniors de tous maners de services, &c. Et pur ceo que tielx services fueront faits ove leur fokes, tiel tenure fuit appel tenure en socage. Et puis apres tielx services fueront changes

en

AND it is said, that the reason, why such tenure is called and hath the name of tenure in socage, is this; because *focagium idem est quod servitium focæ*, and *foca idem est quod caruca*, &c. i. e. a foke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by socage, ought to come with their ploughes, every of the said tenants for certaine daies in the yeare to plough and sow the demesnes of the lord. And for that such workes were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services, &c. And because that such services were done with their ploughs, this tenure was called tenure

in

en denyers, per consent des tenants et per desire des seigniors, scil. en un annuall rent, &c. Mes uncore le nosme de socage demurt, et en divers lyeux les tenants uncore font tiels services ove lour sokes a lour seigniors; issint que tous maners de tenures, que ne sont pas tenures per service de chivaler, sont appels tenures en socage.

in socage. And afterward these services were changed into money, by the consent of the tenants and by the desire of the lords, viz. into an annual rent, &c. But yet the name of socage remaineth, and in divers places the tenants yet doe such services with their ploughes to their lords; so that all manner of tenures, which are not tenures by knight's service, are called tenures in socage.

(6. Co. 59.)

Cap. Burgage,
Sect. 170.

Mirror, cap. 2.
Sect. 18. Vid.

19. E. 2.

Avowrie 224.

3. E. 2. Action

sur le stat. 24.

10. E. 3. 24.

20. E. 3. Avowrie 124. 39. E. 3. 17. 39. Aff. p. 3. 20. Aff. 1. Cap. Confirmation, Sect. 539.

TEMPS *de memory.* Time of memory is when no man alive hath had any prooffe to the contrary, nor hath any conu-
fance to the contrary, as shall be hereafter said in his proper place. And of necessity this change hereafter spoken of, must be before time of memorie; for within time of memory, the services of the plough cannot be changed into money by consent of the tenant and the desire of the lords, *scilicet*, into an annuall rent, neither by re-lease or confirmation or other conveyance, so long as the seigniorie remaineth, as shall be said in his due place.

4. E. 3. 161.

6. E. 3. 283.

“ Devoient vener ove lour sokes.” The plough is named *propter excellentiam*; but the ficle, and the syth, for the reaping in harvest, and such like, are also included. For as *carucata terra*, a plough-land, may contain houses, milles, pasture, medow, wood, &c. as pertaining to the plough; so under the service of the plough, all services of tillage or husbandry are included.

“ Uncore le nosme de socage demurt.” Altho' the cause whereupon the name of socage first grew be taken away, yet the name remains the same it hath been, and is used to distinguish this tenure from a tenure by knight's service. *Nomina si nescis, perit cognitio rerum. Et nomina si perdas, certe distinctio rerum perditur.* Therefore the names of things (as Littleton here teacheth) are for avoyding of confusion diligently to be observed.

[87. a.]

Sect. 120.

ITEM, si home tient de son seignior per escuage certaine, scil. en tiel forme, quant l'escuage curge et est assesse per parliament a greinder summe ou meinder summe, que le tenant paiera a son seignior forsque demy marke pur escuage, et nient pluis ne miens, a quel graund summe ou a quel petite summe que l'escuage curge, &c. tiel tenure est tenure en socage, et nemy service de chivalrie. Mes lou le summe que le tenant paiera pur l'escuage est non cer-
taine,

ALSO, if a man holdeth of his lord by escuage certaine, scil. in this manner, when the escuage runneth and is assessed by parliament to a greater or lesser sum, that the tenant shall pay to his lord but halfe a marke for escuage, and no more nor lesse, to how great a sum, or to how little the escuage runneth, &c. such tenure is tenure in socage, and not knight's service. But where the summe which the tenant shall pay for escuage is un-
certaine,

taine, scil. lou il poit estre que le summe que le tenant paiera pur l'escuage a son seignior, poit estre a un foits le greinder et a auter foits le meinder, selonque ceo que est assesse, &c. donques tiel tenure est tenure per service de chivaler.

certaine, scil. where it may be that the summe that the tenant shall pay for escuage to his lord, may be at one time more and at another time less, according as it is assessed, &c. such tenure is tenure by knight's service.

“**E**SCUAGE certain” is not *in rei veritate servitium scuti*, (6. Co. 6.b.) which is to be done by the body of a man, but it is *servitium crumenæ*, of money, which is to be drawne out of the purse, and that is in effect a tenure in socage; wherein it is to be observed, that the service of payment of money is the more base, and lesse profitable for the commonwealth in this case; and hereof somewhat hath been said before in the Chapter of Escuage, Sect. 98, 99.

If a man hold by homage, fealty and escuage, *scil.* by an halfe penny, when escuage runs at fortie shillings, this is a tenure in socage, and no knight's service, for two causes.

First, it is socage tenure, because of the certainty; for to the tenure in socage *certa servitia* doe ever belong, so as the husbandman may the rather live in quiet.

excellently resolved in parliament. Hill. 3. E. 2. coram Rege Rot. 34. Agnes Frowick's case.

Secondly, Escuage is to be paid at every time when it is assessed; and here it is not to be paid, but when it amounteth to forty shillings.

15. E. 2. tit. Avowrie 215.
31. E. 1. Aff.
44. 26. Aff. 66.
5. E. 3. 6.
5. E. 4. 128.
Vid. Rot. Parl.
4. E. 3. nu. 19.
Clavering's case.
Frowick's case.

Sect. 121.

ITEM, *si home tient sa terre pur paier certaine rent a son seignior pur castle-garde, tiel tenure est tenure en socage. Mes lou le tenant doit per luy meme ou per un auter faire castle-garde, tiel tenure est tenure per service de chivaler.*

ALSO, if a man holdeth his land to pay a certaine rent to his lord for castle-gard, this tenure is tenure in socage (1). But where the tenant ought by himself or by another to doe castle-gard, such tenure is tenure by knights service.

[87. b.] **H**EREIN the difference standeth thus. If a rent be paid for castle-garde, it is cleere a socage tenure, as it is agreed in *Lutterel's* case according to *Littleton's* opinion. But if a summe in grosse, or other thing, be voluntarily paid or given by the tenant, and voluntarily received by the lord in lieu of castle-gard, yet the tenure by knight's service remaineth. Vide Sect. 98. & 99.

Vid. Sect. 98, 99.
Vide 4. Co. 88.
in *Lutterel's* case.
19. R. 2. Gard.
195. 26. Aff. 66.
F. N. B. 83. 256.
6. Co. 20. *Gregorie's* case.

(1) [See Note 58.]

Sect. 122.

ITEM, en tous cas ou le tenant tient del seignior a paier a luy ascun certaine rent, cel rent est appelle rent service.

ALSO, in all cases where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent service.

IT is called rent service, because it is accompanied with some corporal service, as fealty at the least; in respect whereof the lord may distraine for it of common right. See more of this matter in the Chapter of Rents.

Sect. 123.

ITEM, en tielx tenures en socage, si le tenant ad issue et devie, son issue estant deins l'age de 14 ans, donques le prochain amy del heire (1), a que le heritage ne poit descendre, avera la garde de la terre et del heir j'esque al age del heir de 14 ans, et tiel gardein est appelle gardein en socage. Car si la terre descendist al heire de part le pier, donques la mere, ou auter prochaine cosen de part la mere, avera la garde. Et si la terre descendist al heire de part la mere, donques le pier ou le prochain amy de part del pier avera le garde de tielx terres ou tenements. Et quant l'heire vient al age de 14 ans compleat, il poit enter et ouster le gardein en socage, et occuper la terre luy mesme, s'il voit. Et tiel gardeine en socage ne prendra ascuns issues ou profits de tielx terres ou tenements a son use demesne, mes tantselement al use et profit del heire; et del ceo il rendra accompt al heire, quant pleast al heire apres ceo que l'heire accomplist l'age de xiiii. ans. Mes tiel gardein sur son accompt avera allowance de tous ses reasonable costs et expences en tous choses, &c. Et si tiel gardein maria l'heire deins xiiii. ans, il accomplera al heire, ou a ses executors, de value del mariage, coment que il ne prist riens pur le value del mariage;

ALSO, in such tenures in socage, if the tenant have issue and die, his issue being within the age of 14 yeares, then the next friend of that heire, to whom the inheritance cannot descend, shall have the wardship of the land and of the heire untill the age of 14 yeares, and such gardeine is called gardeine in socage. For if the land descend to the heire of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heire of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. And when the heyre cometh to the age of 14 years complete, he may enter and oust the gardian in socage, and occupy the land himselfe, if he will. And such gardian in socage shal not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heire; and of this he shal render an account to the heire, when it pleaseth the heire after he accomplisheth the age of 14 yeares. But such gardian upon his account shall have allowance of all his reasonable costs and expences in all things, &c.

(1) [See Note 59.]

mariage; pur ceo que il serra rette sa folly demesne, que il luy voloit marier sans prendre la value del mariage, sinon que il luy maria a tiel mariage, que est tant en value come le mariage del heire, &c. And if such gardian marry the heire within age of 14 yeares, he shall account to the heire, or his executors, of the value of the mariage, although that he tooke nothing for the value of the mariage; for it shall be accounted his own folly, that he would marry him without taking the value of the mariage, unles that he marrieth him to such a marriage, that is as much worth in value as the marriage of the heire.

[88. a.] “*EN tiels tenures en socage.*” If a man be seised of a rent charge, rent secke, common of pasture, and such like inheritances, which doe not lie in tenure, and dyeth, his heire within age of 14 yeares; in this case the heire may choose his gardein: but if he be of such tender yeares as he can make no choice, then (if the father hath made no disposition of the custody of the childe) it were most fit, that the next of kin, to whom the inheritance cannot descend, should have the custody of him (2). And whosoever taketh the rent, &c. the heire shall charge him in an account. But if he hold any land in socage, in that case the gardian in socage shall take into his custody as well the rent charges, &c. as the land holden in socage, because he hath the custody of the heire.

Vide le statute de 4. & 5. Ph. & Marie cap. 8.

“*Si le tenant ad issue et devie.*” The same law it is if the tenant hath no issue, but a brother or cosin within age of 14 yeares at the time of his death. [a] Also this doth extend as well to issue female, as to issue male.

[a] 10. R. 2. Account 132.

“*Deins l'age de 14 ans.*” Of this sufficient hath been spoken in the next preceding Chapter.

“*Donques le prochain amy del heire, a que le enheritance ne peut descendre.*” The next friend of the heire, &c. Here amy or friend is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot descend, whereby affinity without blood is excluded.

Glanvil. lib. 7. cap. 11. Britton, 163. Fleta, lib. 1. cap. 9 Stat. de Hibernia, dit. Partition. (Plowd. 446.)

“*Le prochain,*” the next.

[b] If there be three brethren, and the youngest holdeth land in socage, and hath issue and dyeth his issue within age of 14 yeares, both the uncles are in equall degree, and yet the eldest shall be gardian; because in equall degree the law preferreth him. [c] And yet if lands holden in socage be given to a man and to the heirs of his body, and he dyeth his heire within age, the next cosin of the part of the father, albeit he be worthier, shall not be preferred before the next cosin of the part of the mother, but such of them as first sealeth the heire shall have his custody (1). But if lands be given in frankmariage, and the donees have issue and dye their issue within age of 14 yeares, the next of kin of the part of the mother shall have the custody of the body, and not the next of kin of the part of the father, albeit he first sealeth it, because the mother was the cause

[b] Vid. 30. Ass. 47.

[c] Pl. com. Carrel's case.

47. H. 3. Gard. 146. (2. R. 2. Abr. 40. Ante 22. a.)

(2) See post. 88. b.

[88. a.]

(1) This is according to the rule, in

equali jure melior est conditio possidentis. Plowd. 296. in Carrel's case. See too Hawk. Abr. of Co. Litt.

cause of the gift. If a man be seised of lands holden in socage of the part of his father, and of other lands holden in socage of the part of his mother, and dyeth his issue being within the age of 14 yeares, in this case such of the next of kinne of either side, as first [88. b.] happeth the body of the heire, shall have him (1); but the next of blood of the part of the father shall enter into the lands of the part of the mother, and the next of kinne of the part of the mother shall enter into the lands of the part of the father (2).

[d] F. N. B. 139. b. Regist.

[e] 7. E. 3. 46.

16. E. 3. acc. 52.

21. E. 3. 8.

31. E. 3. Enfant

9. 17. E. 2.

Account 121.

26. E. 3. 63.

10. H. 6. 14.

F. N. B. 118.

[f] Bract. li. 2. fo. 88.

[b] Flet. 1. 1. ca. 10.

[d] If *A*. be gardian in socage of the body and lands of *B*. within the age of fourteene yeares, *A*. shall be gardian in socage *per cause de gard* (3). But an infant within age, that [e] is not in the custody of another, cannot be gardian in socage; because no writ of account lyeth against an infant. And herewith agreeth *Bract*. [f] and yeeldeth this reason, *alium regere non potest, qui seipsum regere non novit*. And *Fleta* saith, [b] that *minor minorem custodire non debet; alios enim præsumitur malè regere, qui seipsum regere nescit*. And by like reason an ideot, a man *non compos mentis*, a lunaticke, a man *cæcus et mutus*, or *surdus et mutus*, or a leper removed by a writ *de leproso amovendo*, cannot be gardian in socage. But in the case of gard *per cause de gard*, there lyeth an action of account against *A*. in the case above said.

[i] Lib. Rub. cap. 70.

[k] Glanv. lib. 7. ca. 11.

[l] Pl. Com.

Carrel's case.

(2. Ro. Abr. 40.

Cro. Eliz. 825.

Mo. 635.)

[m] Lit. lib. 1. fo. 2, 3.

"*A que le heritage ne poet descender.*" [i] *Nullus hæredipet a suo propinquo vel extraneo periculosa sanè* (4) *custodia committatur*. Note [k] this word (*poet*) may or can. [l] And therefore this doth not onely exclude an immediate discent, but all possibility of discent. As if a man hath issue two sons by several venters, and having lands holden in socage of the nature of burgh *English* dieth the yonger brother within age of 14 yeares, [m] the elder brother of the halfe blood shall not have the custody of the land (5); because by possibility the elder may inherit the land; for if the yongest dye without issue, and the land discent to an uncle, the elder brother of the halfe blood may be heire unto him: and herewith doth agree our ancient authors. [n] *Hæres sokmanni sub custodiâ capitalium dominorum non erit, sed sub custodiâ consanguineorum suorum propinquorum, hoc est, eorum qui conjuncti sunt jure sanguinis, et non jure successionis, ex parte quorum non descendit hæreditas; et regulariter verum est, quòd nunquam remanebit aliquis in custodiâ alicujus, de quo haberi possit suspicio, quòd velit jus clamare in ipsâ hæreditate, et unde si plures sint filii et hæredes tenere debeant in socagio, nulla debet esse in custodiâ alterius*. [o] And this is contrary to the civil law; for *leges civiles impuberum tutelas proximis de eorum sanguine committunt, siue agnati fuerint, siue cognati, unicuique, videlicet, secundum gradum et ordinem, qui in hæreditate pupilli successurus est*. But this the law of *England* saith, *est quasi agnum lupo committere ad devorandum* (6).

[n] Bract. lib. 2. fol. 87.

Brit. fol. 163. b.

Flet. lib. 1. c. 9.

28. E. 1. Stat. 1.

Fortesc. c. 40.

[o] Fortesc. ubi supra. Statut. de Homagio capiendis, tempus E. 1.

"*Donques la mere.*" Note, albeit land cannot discent to the mother from her sonne, (as hath beene said) because inheritance cannot ascend, yet here it appeareth by *Littleton*, that she is next of blood (7), for that none (as hath beene said) can be gardian in socage

(1) See ante 88. a. note 1.

(2) [See Note 60.]

(3) [See Note 61.]

(4) *Sine* instead of *sanè* seems necessary to the sense of this passage.

(5) [See Note 62.]

(6) [See Note 63.]

(7) As to the construction of the words *next of blood* in other cases, see ante 10. b. and note 2. there.

cage but the next of blood; and the like is to be said of the father, as hereafter next appeareth.

“*Donques le pier.*” By this it appeareth, that the father in case of a tenure in socage shall be gardian in socage, and shall not have the custody of his eldest sonne, in respect of his paternall naturall custody, (as he shall have in case of a tenure by knights service, as before appeareth) (8) but as gardian in socage. And the reason of the diversity is, for that in the case of a tenure in socage, the father must by law be accountable to the sonne both for his marriage, and also for the profits of his lands, which he should not be if he had the custody of his eldest sonne in this case as his father in respect of nature (9), and the act of law never doth any man wrong.

But no lord or other person, in respect of any tenure by knights service or otherwise, shall have the custody of any childe that is heire apparant to his father, but the father only during his life, as hath beene said before. (10)

It is to be observed, that in the lawes of *England*, there are three manner of guardianships, viz. by the common law, by statute law, and by custome. By the common law there are foure manner of guardians, viz. gardian in chivalry (whom *Littleton* hath described before, Sect. 103, &c.) (11) gardian by nature, as the father of the eldest son, of whom *Littleton* hath spoken Sect. 114, (12) gardian in socage, treated of by *Littleton* in this Section, and gardian *per cause de nuture*; (13) all frequent in [a] our books. By statute, viz. the statute in 4. and 5. *Pb. & Mar.* of women children, and that is in two manners, either of the father or mother (14) without assignation, or of any other to whom the father shall appoint the custody, either by his last will, or by any act in his life-time, whereof you shall reade at large [b] in *Ratcliffe's* case in my Reports (15). [c] Lastly, by custome, as of orphans by the custome of the city of *London*, and of other cities and boroughes (16).

[a] 8. E. 3. 43.
8. E. 4. 5.
(5. Co. 37.)

[b] 3. Co. 57.
Ratcliffe's case.

[c] 32. E. 3.
Gard. 31.
8. R. 2. Gard.
166.
(Cro. Jam. 99.)

“*Tantsolement al use et profit del heire.*” And therefore gardian in socage shall not forfeit his interest by outlawrie or attainder of felony or treason; because he hath nothing to his owne use, but to the use of the heire.

[89. a.]

Also if the mother be gardian in socage, and taketh husband, and dyeth, the husband shall not have this custody by survivour; because the wife had it *en auter droit*, in the right of the heire.

Pl. Com.
(3. Co. 39.)

A gardian in socage shall not [d] present to a benefice in the right of the heire; because he cannot be accomptable therefore, for that he can make no benefit thereof, for the law doth abhorre simony, or any corrupt contract for benefices; and therefore in that case the heire shall present himselfe (1). And *Britton* speaking of these guardians said well, *les queux gardeins sont plus servants que gardeins*, (that is) which guardians are rather servants then guardians.

[d] 8. E. 2.
Presentment 10.
7. E. 39.
27. E. 3. 89.
29. E. 3. 5.
F. N. B. 33.
31. E. 3. Estop.
pel 340.
Britton, 163,
Post. 120. a.)

164. *Fleta*, lib. 1. cap. 10. (2. Ro. Abr. 41. Cro. Jam. 99. 3. Inf. 156. Post. 120. a.)

“ II

(8) Ante 84. b.

(9) [See Note 64.]

(10) Ante 84. a.

(11) [See Note 65.]

(12) [See Note 66.]

(13) [See Note 67.]

(14) [See Note 68.]

(15) [See Note 69.]

(16) [See Note 70.]

[89. b.]

(1) [See Note 71.]

“ *Il rendra account, &c. apres que l'heire ad accomplisse l'age de 14 ans.*” This point hath beene much controverted in our bookes, and the causes of the doubts have beene, 1. Upon the words of the statute of [e] *Merlebridge*, ca. 17. 2. Upon the originall writ of account against the gardian in socage. The words of the statute be, *cum ad legitimam ætatem pervenerit sibi respondeat, &c.* and *legitima ætas* [f] lawfull age is xxi. yeares. Also the writ of accompt reciteth the said statute, *quare cum de communi consilio regni nostri provisum sit, quod custodes terrarum & tenementorum, quæ tenentur in socagio, hæredibus terrarum & tenementorum illorum, cum ad plenam ætatem pervenerint, reddant rationabilem computum.* [g] Whereupon it is gathered that no action of account did lye against the gardian in socage at the common law, untill the heire be of his lawfull age of 21 yeares. But as to the first (*legitima ætas*) as the statute [b] speaketh, or *plena ætas* (as the writ doth render it) are to be understood *secundum subjectam materiam*, that is of the heire of socage land, whose lawfull and full age as to the custody or guardianship is 14. And as to the recitall of the statute, [i] it is evident that an action of account did lye against gardian in socage at the common law; and that the statute was made in affirmance or declaration of the common law; for the statute speaketh onely *de custodia parentum*, that is of a gardian in right; but yet an action of account lyeth against him that occupieth the land as gardian, albeit he be not of the blood (as hereafter shall be said). And upon consideration had of the said statute and of all the bookes, it was adjudged in the court of common pleas, *Pasch. 16. Eliz. Rot. 436.* according to the opinion of *Littleton*, that the heire after the age of 14 yeares shall have an action of account against the gardian in socage, when he will at his pleasure; and so is an ancient question well resolved (2).

Britton was of opinion, that the statute of *Merlebridge*, which gave the *capias* in account, extended to gardian in socage, for he wrote before the statute of *W. 2. c. 11.* But later bookes have over-ruled this point, that no *capias* lyeth against gardian in socage, for the statute extendeth to bailifes only. Neither doth the statute of *W. 2.* extend to gardian in socage, for that speaketh only *de servientibus, ballivis, camerariis, & receptoribus.*

“ *Mes tiel gardein sur son account avera allowance de tous ses raisonnable costs et expences en tous choses.*” (3) And this is due to all accountants by the common law (4); and so it is declared by the said statute of *Merlebridge*, *salvis ipsis custodibus rationabilibus missis suis.*

“ *Allowance.*” What other allowances shall the gardian have? If the gardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof (5). As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account. And seeing the gardian shall be charged as bailife after the heire's age of 14, and be discharged upon his account if he be robbed, *pari ratione* if he be robbed before the age of 14. But otherwise

[e] It is called the statute of *Merlebridge*, because the parliament in 52. H. 3. was holden there.

[f] 16. E. 3. Wast. 100.

18. E. 3. 55. 77.

29. E. 3. 5.

Vide 32. E. 3.

Gard. 31.

F. N. B. 118.

6. E. 3. 38.

[g] 16. E. 2.

Account 120.

17. E. 2. ibid.

121.

[b] 2. E. 2. Account.

14. E. 3. ib.

3. Mar. Dy.

137. Keylwey

131.

[i] 18. E. 2.

Avowry 220.

(2. Inst. 380.)

Cro. Cha. 229.)

Pasch. 16. Eliz.

Rot. 436. in

communi banco.

Mirror, ca. 2.

sect. 17.

Britton, fol.

163. b.

Fleta, lib. 2.

cap. 64. 18. E. 2.

Avowry 220.

17. E. 3. 59.

Merlbr. ca. 29.

W. 2. ca. 11.

The statute of Merlbr. intended by Littl. is ca. 17.

41. E. 3. 3.

22. Aff. 41.

22. E. 3.

Account 111.

29. Aff. 28.

3. H. 7. 4. b.

6. H. 7. 12.

10. H. 7. 25.

10. H. 6. 21.

2. E. 4. 15.

Doct. & Stud.

c. 38. fo. 130.

(Cro. Eliz. 219.)

1. Ro. Ab. 2, 3.

124.)

(2) [See Note 72.]

(3) [See Note 73.]

(4) [See Note 74.]

(5) [See Note 75.]

wife it is of a carier, for he hath his hire (6), and thereby implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them (7). Note the diversity, and so it was resolved * in the king's bench.

So it is if goods be delivered to a man to be safely kept, and after those goods are stolen from him, this shall not excuse him; because by the acceptance he undertooke to keepe them safely, and therefore he must keepe them at his perill.

So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law (9). But if the goods be delivered to him to be kept as he would keepe his owne, there if they be stolen from him without his default or negligence, he shall be discharged. So if goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged; because he hath a property in them (10), and therefore he ought to keepe them no otherwise then his owne; but if he that gaged them, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

[89. b.] If *A.* leave a chest locked with *B.* to be kept, and taketh away the key with him, and acquainteth not *B.* what is in the chest, and the chest together with the goods of *B.* are stolen away. *B.* shall not be charged therewith, because *A.* did not trust *B.* with them, as this case is (1). And that which hath beene said before of stealing, is to be understood also of other like accidents, as shipwracke by sea, fire by lightning, and other like inevitable accidents (2). And all these cases were resolved, and adjudged in the king's bench.* And by these diversities are all the bookes concerning this point reconciled (3).

Note, reader, it is necessary for any that receiveth goods to be kept, to receive them in this speciall manner, viz. to be kept as his owne, or to keep them at the perill of the owner (4). But now is *Littleton* to be further heard.

“*Et si tiel gardein maria le beire deins 14 ans, &c.*” For if he marry the heire after 14, he is out of his custody, and no account shall be made therefore.

“*Il accountera a luy.*” He shall account for the mariage of the heire, viz. for so much as any man *bonâ fide* had offered for the mariage, or would give in mariage unto him.

“*Ou a ses executors.*” Not (5) that an infant of the age of 14 may make his will (as some hereupon have collected); but the meaning of *Littleton* is, that if after his mariage he accomplish his age of 18 yeares, at what time he may make his testament (6), and constitute

* Hil. 38. Eliz. inter Woodliffe and Curties. (8) (4. Co. 83. b. Cro. Eliz. 815. Cro. Jam. 188. Noy 126.) 29. Aff. p. 28. (Cro. Jam. 183, 189.)

8. E. 2. tit. Detinue 59. (8. Co. 32. 5. Co. 13. b.) (Doct. & Stud. 129. b.)

* Pasch. 43. Eliz. inter Southcote & Bennet, in Detinue. (4. Co. 83. b.)

(6) [See Note 76.]

(7) [See Note 77.]

(8) S. C. Mo. 462. Ow. 57. 1. Ro. Abr. 2.

(9) [See Note 78.]

(10) [See Note 79.]

[89. a.]

(1) [See Note 80.]

(2) [See Note 81.]

(3) [See Note 82.]

(4) We have already observed, that in general this distinction is now exploded. Ante 89. a. note 9. See further tit. *Bailment* and *Carrier* in New Abr., tit. *Bailment* and *Action for Negligence* in Vin. tit. *Action on the case for misfeasance* in Com. Dig. Law of Nisi Prius ed. 1775. p. 69.

(5) It is note in all the former editions, but not is apparently the true reading.

(6) [See Note 23.]

7. E. 3. 62.
19. E. 3.
Account 56.
38. E. 3. 7.
31. E. 3. tit.
Account 57.

tute executors for his goods and chattells, and the words are so to be understood, as may stand with law and reason. Note, executors could not have an action of account at the common law, in respect of the privity of the account; but the statute of *W. 2. ca. 23.* hath given the action of account to executors, the statute of *25. E. 3. ca. 5.* to executors of executors, and the statute of *31. E. 3. c. 11.* to administrators.

3. E. 3. 10.
46. E. 3.
Account 40.
2. R. 2. ibid. 45.
6. R. 2. Account 47.

“*Que il voile luy marier sans prendre le value.*” So as the gardian shall not account only for that which he shall receive in this case, but for that also which he might receive.

“*Sinon que il luy marier a tiel mariage que est tant en value, &c.*” This needeth no explanation.

Hill. 3. E. 2.
coram Rege
Rot. 34. Agnes
Frowick's case.
F. N. B. 139.
1. & 140. 26. E. 3. 65. 1. E. 3. 19, 20.

If the heire in socage be ravished out of the custody of the gardian, and the ravisher marieth the heire, the gardian shall have a writ of ravishment of ward, and recover the value of the mariage, &c. and shall account to the heire for the same.

And the gardian in socage is bounden by law, that the heire be well brought up, and that his evidences be safely kept.

Tri. 1. H. 5.
coram Rege,
Rot. 1. Midd.

The grandmother of the sonne and heire of *John Berneville*, who held the manor of *Totington* in the county of *Midd.* in socage, recovered the heire in a ravishment of ward against *Simon Chevin*, which had married the stepmother of the heire; and by the rule of the court, the plaintife *pro nutrienda hæredis et pro custodia evidentiæ invenit plegios.*

Sect. 124.

ET si ascun autre home, que n'est procheine amy, occupie les terres ou tenements del heire come gardeine en socage, il serra compell' de render accompt al heire, auxi bien sicome il fu ssyot prochein amy; car il n'est pas plee pur luy en briefe d'accompt a dire, que il n'est procheine amie, &c. mes il respondra le quel il ad occupie les terres ou tenements come gardeine en socage ou nemy. Sed quære, si apres ceo que le heire ad accomplish l'age de 14 ans, et gardeine en socage continualment occupia la terre tanque l'heire vient a plein age, scil. 21 ans, si le heire a son plein age avera action d'accompt envers le gardein, de temps que il occupia apres les dits 14 ans, come envers gardeine en socage, ou envers luy come son baylife.

AND if any other man, who is not the next friend, occupies the lands or tenements of the heire as gardian in socage, he shall be compelled to yeeld an account to the heire, as wel as if he had beene next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c. but he shall answer whether he hath occupied the lands or tenements as gardian in socage or no. But quære, if after the heire hath accomplished the age of 14 yeares, and the gardian in socage continually occupieth the land until the heire comes to full age, scil. of 21 yeares, if the heire at his full age shall have an action of account against the gardian, from the time that he occupied after the said 14 yeares, as gardian in socage, or against him as his bailife.

“ *ET si ascun auter home, que n'est pas procheine amy, &c.*” If a stranger entreth into the lands of the infant within age of 14, and taketh the profits of the same, the infant may charge him as gardian in socage. And this doth well agree with the writ of account against a gardian in socage; for the words be, *Idem B. præfato A. rationabilem compotum suum de exitibus proventibus de terris et tenementis suis in N. quæ tenentur in socagio, et quorum custodiam idem B. habuit dum præd. A. infra ætatem fuit, ut dicitur.* And true it is, that in judgement of law he had the custody of the lands: and he is called *tutor alienus*, and the right gardian in socage *tutor proprius*; and it is no plea for him to denie that he is *procheine amy*, but he must answer to the taking of the profits (1), as *Littleton* here saith.

[90. a.]

Account 35. 10. H. 7. 7. 4. H. 7. 6. b. 7. H. 7. 9. a.

“ *Sed quære, &c.*” This *quære* came not out of *Littleton's* quiver; for it is evident, that after the age of 14 yeares he shall be charged as bailife at any time when the heire will, either before his age of 21 yeares, or after (2).

19. E. 2.
Avowry 221.
39. E. 3. 16.
41. E. 3. Account 35.
49. E. 3. 10.
18. E. 3. 77.
28. Aff. p. 11.
Pl. Com. 542.
6. E. 3. 38.
F. N. B. 118.
13. E. 3.
Account 77.
22. E. 3. 11.
41. E. 3.
7. H. 7. 9. a.
6. E. 3. 38.
32. E. 3.
Account 60.
7. E. 4.
F. N. B. 118.

Sect. 125.

ITEM, si gardein en chivalry face ses executors et devy, le heire esteant deins age, &c. les executors averont le garde durant le nonage, &c. Mes si gardein en socage face ses executors et devy, le heire esteant deins l'age de 14 ans, ses executors n'averont pas le garde; mes un auter procheine amy, a que le heritage ne poyt my discender, avera la garde, &c. Et la cause de diversity est, pur ceo que gardein en chivalrie ad le garde a son proper use, et gardian en socage n'ad le garde a son use, mes al use del heire (1). Et en cas lou le gardein en socage devy devant ascun accompt fait per luy al heire, de ceo le heire est sans remedie, pur ceo que nul briefe d'accompt gist envers les executors, si non pur le roy solement.

ALSO, if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executors shall have the wardship during the nonage, &c. But if the gardian in socage make his executors and die, the heire being within the age of 14 yeares, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversity is, because the guardian in chivalrie hath the wardship to his owne use, and the gardian in socage hath not the wardship to his owne use, but to the use of the heire. And in this case where the gardian in socage dyeth before any account made by him to the heire, of this the heire is without remedy, for that no writ of account lieth against the executors (2), but for the king onely.

“ A SON

(1) [See Note 84.]

(2) Notwithstanding lord Coke's observation on the *quare*, it is in L. and M. Roh. P. and both of the MSS.

[90. b.]

(1) [See Note 36.]

(2) [See Note 87.]

7. R. 2. Br. 634.
40. E. 3. 14.
2. H. 4. 10.
10. Eliz. Dier
277.
(Post. 117.
4. Co. 64 b.)
7. H. 4. 41.
44 E. 3. 42.

24. E. 3. 26.
44 E. 3.
F. N. B. 33.
See more of this
in the Chapter
of Warranty,
Sect. 740.
(Cro. Jam. 248.)

31. E. 3. Ac-
count 57.
19. E. 3. ibid. 156.
48. E. 3. 2.
2. H. 4. 13.
F. N. B. 117.
19. H. 6. 5.
4. E. 4. 25.
43. E. 3. 21.
11. Co. 89.
(2 Inst. 404.)
[*] Rot. Parl.
50. E. 3. nu. 123.

[a] Pl. Com. 321.
Keyleway 131.
11. Co. 89.

Viñ. S. Ct. 178.
Stanf. Præ. 32.

[b] Fortescue
fo. 45. Rot. Parl.
1. H. 4. nu. 188.
Pl. Com. 236.
Stanf. Pl. Cor.
162. b. Stanf.
Præ. 1. a. &
10. b.

[*] Stanf. Præ.
5. 10.
[c] Westm. 1.
cap. 50.
[d] Britton, fol.
27.
[e] Regult. fol. 61, &c.

“*A SON proper use.*” A tenant holdeth land of a bishop by knights service, which seigniorie the bishop hath in the right of his bishoprick, the tenant dieth his heire within age, the bishop either before or after seisure dyeth; neither the king, nor the successor of the bishop, shall have the wardship, but his executors. For albeit the bishop hath the seigniorie *en auter droit*, yet the wardship being but a chattell, he hath in his owne right, and a chattell cannot goe in the succession of a sole corporation, unless it be in the case of the king (3).

And yet if a bishop have an advowson, and the church become void, and the bishop die, neither the successor nor the executors shall present, but the king: because it is but a *chose in action* (4). And so it is in case where the king hath wardship, but that is a prerogative that belongeth to the king to provide for the church being void; for where the tenure by knights service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant.

[90. b.]

“*Le beire est sauns remedie, &c.*” For albeit in an action of account against a gardian in socage, &c. the defendant cannot wage his law, yet in respect of the privy of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lyeth against the executors of the accountant, nor at the common law for the executors of him to whom the account is to be made, as is aforesaid (3); but that is holpen by statute (4). [*] It hath beene attempted in parliament to give an action of account against the executors of a gardian in socage, but never could be effected (5).

“*Si non pur le roy solement.*” [a] The reason of this is, because the king's treasure is the sinewes of warre, and the honour and safety of the king in time of peace, *firmamentum belli, et ornamentum pacis*; and therefore the death of the party shall not barre the king of his treasure due unto him upon the account, because it is intended, that the king was busied about the publicke for the good of the common-wealth, and had not leisure to call his accountant to make his account, *et nullum tempus occurrit regi* (6). Littleton speaketh of the king's prerogative but twice in all his bookes, viz. here, and Sect. 178. and in both places, as part of the lawes of England. *Prærogativa* [b] is derived of *præ*, i. e. *ante*, and *rogare*, that is, to aske or demand before-hand, whereof commeth *prærogativa*, and is denominated of the most excellent part; because though an act hath passed both the houses of the lords and commons in parliament, yet, before it be a law, the royall assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally [*] it extends to all powers, preheminences, and priviledges, which the law giveth to the crowne, whereof Littleton here speaketh of one. *Bract.* lib. 1. in one place calleth it *libertatem*, in another *privilegium regis*; [c] Britton [d] (following *W. 1.*) *droit le roy*; [e] *registr. jus regium*, and *jus regium corone*, &c.

[90. a.]

(3) Acc. ante 9. a. 46. b. post. 388. a.

(4) [See Note 85.]

(4) [See Note 89.]

(5) [See Note 90.]

(6) See post. 119. 7, and the note there.

[90. b.]

(3) [See Note 88.]

Sect.

Sect. 126.

ITEM, le seignior, de que la terre est tenu en socage, apres le mort son tenant avera reliefe en tiel forme. Si le tenant tient per fealtie et certain rent a paier annualment, &c. si les termes de payment sont a payer per deux termes del an, ou per quater termes del an, le seignior avera del heire son tenant tant, come le rent amount, que il paye per an. Sicome le tenant tient de son seignior per fealtie, et x s. de rent payable a certaine termes del an, donques l'heire paiera al seignior x s. pur reliefe, ouster les x s. que il paiera pur le rent.

ALSO, the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c. if the tearmes of payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord shal have of the heire his tenant as much, as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne shillings rent payable at certaine terms of the yeare, then the heire shall pay to the lord ten shillings for relief, beside the tenne shillings which he payeth for the rent.

"CERTAINE rent." A tenant holdeth of his lord certaine lands in socage, to pay yearely a paire of gilt spurs or five shillings in money at the feast of *Easter*. In this case the rent is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for reliefe; but if he pay it not when he ought, then may the lord distraine for which of them he will. But if the tenure be to attend on his lord at the feast of *Christmasse*, or to pay ten shillings, there the reliefe must be ten shillings, because the other cannot be doubled. *Et sic de similibus.*

43. E. 3. Barre
294. 9. E. 4. 36.
Bract. lib 2.
fol. 35.
Glanvil. lib. 9.
cap. 4.
(2. Ro. Abr. 519.
Post. 145 a.)
(2. Co. 37.
2. Ro. Abr. 519.)

"A paier annualment." If the tenant holdeth of his lord by fealty, and to pay every two or three year ten shillings, albeit this be no annuall rent, yet shall he pay ten shillings for reliefe. *Et sic de similibus.*

But it is to be noted, that beside reliefe, whereof *Littleton* here speaketh, there belongeth to a tenure in socage of common right aid for the making of his eldest son a knight at the age of fifteene years, and to marry his daughter at the age of 7 yeares (1).

Vid. Sect. 103.
F. N. B. 82.
West. 1. cap. 35.
25. E. 3. Rat. 5.
cap. 11.

En mesme le manner est, si home soit seise de certaine terre que est tenu en socage, et fait feoffement en fee a son use, et morust seise del use, (son heire del age de 14 ans ou plus, et nul volunt per luy declare) le seignior avera reliefe del heire, sicome avant est dit. Et c'est per

In the same manner it is, if a man be seised of certaine land which is holden in socage, and maketh a feoffement in fee to his owne use, and dieth seised of the use, (his heire of the age of 14 yeares or more, and no will by him declared) the lord shall have reliefe

(1) We have already had occasion to observe, that these aids are taken away by

the 12. Cha. 2. c. 24. Ant. 76. a. note 7.

per le statute de ann. 19. Hen. 7. cap. 15. (2) relieve of the heire, as afore is said. And this by the statute of 19. H. 7. cap. 15.

This is an addition to *Littleton*, whereof I omit it the rather, for that the statute of 19. H. 7. is for the cause above-mentioned become of none effect.

Sect. 127.

ET en tiel cas, apres la mort le tenant, tiel reliefe est due al seignior maintenant, de quel age que le heire soit; pur ceo que tiel seignior ne poit aver le garde de corps, ne de terre le heire. Et le seignior en tiel case ne doit attendre a le payment de son reliefe, solonques les termes et jours de payment de rent; mes il doit aver son reliefe maintenant, et pur ceo il poet incontinent (1) distraine apres le mort son tenant pur reliefe.

AND in this case, after the death of the tenant, such reliefe is due to the lord presently, of what age soever the heire be; because such lord cannot have the wardship of the body, nor of the land of the heire. And the lord in such case ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent; but he is to have his reliefe presently, and therefore he may forthwith distraine after the death of his tenant for reliefe.

16. H. 7. 4.
18. E. 3. 26.
p. 18. Bracton,
lib. 2. fol. 85.
dabit hæres una
vice redditum
suum unius anni
duplicatum. Britton, fol. 178. acc.

“**M**AINTEENANT;” and as *Littleton* saith, he ought not to attend the payment of his reliefe according to the daies of paiement of his rent, but he ought to have his reliefe presently, and for the same he may incontently distraine after the death of the tenant.

Fleta, lib. 1. cap. 8. (2. Ro. Abr. 519.)

(Ant. 47. b.
2. Ro. Abr. 519.)

And therefore in the case aforesaid, where the tenant holdeth by the rent of five shillings, or a paire of gilt spurres, if the heire be not presently (that is, as presently and as conveniently as he may, all due circumstances considered) after the death of his ancestor ready upon the land to pay reliefe, the lord may distrain for which of them he will; and if the tenant tendered either of them according to the law, and none for the lord was ready there to receive it, yet the lord may distraine for that which was tendred, at his pleasure (2).

[91. b.]

45. E. 3. 19.
35. H. 6. 52.
20. Eliz. Dier
361. Stanf.
Præf. 13. b.
F. N. B. 256.
259.

“*De quel age que le heire soit.*” And yet it appeareth in our bookes, that in this case the king in case of a tenure in socage in chiefe shall not have *primer seisin*, unless the heire be of the age of 14 yeares at the death of his ancestor; for if he be under that age, he is in the gard and custody of his *prochein amy*.

But otherwise it is in case of a common person, as here it appeareth. And where in some impressions these words be added (*issint que il passa l'age de 14 ans*), those words so added are against the law, and no part of *Littleton's* worke (3).

[91. b.]

(2) This part about relief from the heir of *cestui que use*, as lord Coke truly observes, is an addition to *Littleton*; and it first appears in *Redman*. See post. 117. a.

(1) [See Note 91.]

(2) See ant. 83. b. note 4.

(3) Accordingly the words objected to by lord Coke are neither in L. and M. nor Roh.—They were first inserted in P.

Sect.

Sect. 128.

EN mesme le maner est, lou le tenant tient de son seignior per fealtie et un li. de peper ou cummin, et le tenant morust, le seignior avera pur relief un lib. de cummin, ou un lib. de peper, ouster le common rent. En mesme le maner est, lou tenant tient a payer per an certaine number de capons, ou de gallines, ou un paire de gaunts, ou certaine bushels de frument, et hujusmodi.

IN the same manner it is, where the tenant holdeth of his lord by fealtie and a pound of pepper or cummin, and the tenant dyeth, the lord shall have for reliefe a pound of cummin, or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearely a number of capons or hennies, or a pair of gloves, or certaine bushels of corne, or such like.

“*UN lib. de peper ou cumyn.*” Here it is to be observed, that the lord may reserve pepper, or any other things that be *exotica*, foreign, of the growth of outlandish countreyes or beyond sea, as well as of the growth of *England*, whereby navigation (the life of every island) is employed. And where *Littleton* here putteth his case in the disjunctive, if the tenant doth hold by fealty and one pound of pepper or a pound of cummin, he shall pay for reliefe a pound of pepper or a pound of cummin, over and besides the rent. But if the tenant holdeth of his lord by doing of certaine worke dayes in harvest, or to attend at *Christmasse*, or such like, he shall not double the same: for of corporall service, or labour or worke of the tenant, no reliefe is due, but where the tenant holdeth by such yearly rents or profits, which may be paid or delivered, whereof *Littleton* hath put his examples; and by them is manifestly proved, that corporall service, worke, or labour, shall not be doubled in this case. (4)

“*Ou certaine bushels de frument.*” Here it appeareth, that the reliefe of bushels of corne is to be paid presently, though the tenant die in winter before corne be ripe.

[92. a.]

Note, here are examples put of five natures. 1. *Aromatorum exoticozum*, of spices or drugs, of outlandish growth. 2. *Granorum*, of corne of *English* growth. 3. *Avium villaticarum*, of powltry; as capons, hens, &c. 4. *Artificiorum*, of handicrafts; as a paire of gloves generally either of outlandish or *English*. 5. *Aut similia*, or such like, (that is) of like outlandish growth, or of *English* growth, or of powltry, or of artifices outlandish or *English*, and like herein also, that they may be paid or delivered to the lord every year, or every second or third year, &c.

(4) But Rolle tells us, that master Herbert of the Inner Temple in his autumn reading

11. Cha. 1. held the contrary. 2. Ro. Abr. 515.

Sect. 129.

MES en aucun case le seignior doit demurrer a distreiner pur son reliefe jesque a certaine temps. Si come le tenant tient de son seignior per un rose, ou per un bushel de roses, a paier al feast de Nativitie de Saint John Baptiste, si tiel tenant devie en yver, donque le seignior ne poit distreiner pur son reliefe, tanque al temps que les roses per le course del an poient aver lour cresser, &c. Et sic de similibus.

BUT in some case the lord ought to stay to distreine for his reliefe untill a certaine time. As if the tenant holds of his lord by a rose, or by a bushell of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter, then the lord cannot distreine for his reliefe, untill the time that roses by the course of the yeare may have their growth, &c. And so of the like.

(Post. 197. b.) “ **P**ER le course del an.” *Lex spectat naturæ ordinem*, The law respecteth the order and course of nature. *Lex non cogit ad impossibilia*, The law compells no man to impossible things. The argument *ab impossibili* is forcible in law. *Impossibile est quod naturæ rei repugnat*. And here it is to be observed, that Littleton puts a diversity betweene corne and roses; for corne will last. And therefore the tenant must deliver the corne presently before the time of growth (as before is said); and so of saffron, and the like. But roses, or other flowers, that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing. Neither is the tenant driven by law artificially to preserve roses; for the law in these cases respecteth nature, and the course of the yeare, as Littleton here saith, *Et ars naturam imitatur*. Et sic de similibus.

Sect. 130.

ITEM, si aucun voile demander, pur que home poit tener de son seignior per fealty tantselement pur tous maners de services, entant que quant le tenant ferra fealtie, il jurera a son seignior que il ferra a son seignior tous maners des services dues, et quant il ad fait fealtie, en tiel case nul autre service est due: a ceo il poyt estre dit, que lou un tenant tient sa terre de son seignior, il covient que il doit faire a son seignior aucun service. Car si le tenant ne ses heires devoient faire nul manner de service al seignior ne a ses heires, donque per long temps continue il serroit hors de memorie et de remembrance, lequel la terre fuit tenu de le seignior, ou de ses heires,

ALSO, if any will aske, why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall doe his fealty, he shall sweare to his lord that he will doe to his lord all manner of services due, and when he hath done fealty, in this case no other service is due: to this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord. For if the tenant nor his heires ought to do no manner of service to his lord nor his heires, then by long continuance of time it would grow out of memorie, whether the land were holden of

heires, ou nemy, et donques plus tost et plus rediment voilont homes dire, que la terre n'est pas tenus del seignior ou de ses heires, que auterment; et sur ceo le seignior perdra son escheat de la terre, ou per case auter forfeiture ou profit que il poet aver de le terre. Issint il est reason, que le seignior et ses heires ont ascun service fayt a eux, pur prover et testifier, que la terre est tenus de eux.

of the lord, or of his heires, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heires, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heires have some service done unto them, to proove and testifie, that the land is holden of them.

“QUANT le tenant ferra fealty, il jurera a son seignior, &c.”

Here it appeareth, that the doing of the fealty is both a performance of his service, and of his oath also when it is done, for that no other service is due; and that one oath of fealty is taken of all that hold, and is not to be changed for any noveltie or nicety of invention; for judges anciently and continually have suppressed innovations, and would in no case change the ancient common law.

31. E. 3. tit. Gager deliv-
erance 5.

38. E. 3. 1.
42. Ass. p. 12.

4. E. 3. ca. 5.
18. E. 3. ca. 4.
& 6.

4. H. 4. ca. 2.
2. H. 4. fo. 18.

See of this in
the Chapter of
Fee Simple,
Sect. 4.
(1. Ro. Abr. 816.
F. N. B. 144.
Ante 13. a.)

[92. b.] “Il covient que il doit faire a son seignior ascun service.” For there can be no tenure without some service; because the service maketh the tenure.

“Son escheat de la terre.” *Eschaeta* is derived of this word *eschier*, *quod est accidere*; for an escheat is a casuall profit, *quod accidit domino ex eventu et ex insperato*, which hapneth to the lord by chance and unlooked for. And of this word *eschaeta* commeth *eschaetor*, an eschaetor, so called, because his office is to enquire of all casuall profits, and them to seise into the king's hands, that the same may be answered to the king (1).

Lands may escheat to the lord two manner of wayes: one by attainder, the other without attainder. By attainder in three forts. First, *Quia suspensus est per collum*. Secondly, *Quia abjuravit regnum* (2). Thirdly, *Quia utlegatus est*. Without attainder; as if the tenant dies without heire.

See more of this
in the Chapter
of Warrantie,
Sect.

“Ou per case auter forfeiture.” As if the land be aliened in mortmain; or when *Littleton* wrote, if the tenants had erected crosses upon their houses or tenements in prejudice of the lords, that the tenants might claim the priviledge of the *Hospitalers* to defend themselves against their lords, they had forfeited their tenancies. But since *Littleton* wrote, the *Hospitalers* are dissolved, and consequently that forfeiture is gone.

W. 2. ca. 33.
Flet. li. 2. ca. 43.
& li. 5. ca. 31.
32. H. 8. ca. 24.
(F. N. B. 144.)

“Ou profit.” As *reliefe*, *aide pur filz marier*, *aide pur faire filz chevalier*, and the like.

(1) See further as to *escheat* and *eschaetor*, ante 13. b. and 18. b. and note 2. there.
4. Inst. 225. Mad. Excheq. chap. 10. f. 2.

(2) [See Note 91.]

Sect. 131.

[93. a.]

ET pur ceo que fealtie est incident a tous manners de tenures, forpris le tenure in frankalmoigne, (sicome ferra dit en le tenure de frankalmoign) et pur ceo que le seignior ne voiloit al commencement del tenure aver ascun auter service forsque fealtie, il est reason, que home poet tener de son seignior per fealtie tantseulement; et quaunt il ad fait son fealtie, il ad fait tous ses services.

AND for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (1), (as shall be said in the tenure of frankalmoigne) and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty onely; and when he hath done his fealty, he hath done all his services.

(4. Co. 8. Post. "FEALTIE est incident."
143. a.)

Of incidents there be two sorts, viz. separable, and inseparable.

Separable, as rents incident to reversions, &c. which may be severed: inseparable, as fealty to a reversion or tenure, which cannot be severed: for as all lands and tenements within *England* are holden of some lord or other, and either mediately or immediately of the king; so to every tenure at the least fealty is an inseparable incident, so long as the tenure remains; and all other services, except fealty, are severable. But where the tenure is by fealty only, there is no reliefe due for the cause abovesaid (2).

Sect. 132.

ITEM, si un home lesee a un auter pur terme de vie certaine terres ou tenements, sauns parler de ascun rent render a le lessor, uncore il ferra fealtie a le lessor, pur ceo que il tient de luy. Auxy si un lease soit fait a un home pur terme de ans, il est dit, que le lesee ferra fealtie a le lessor, pur ceo que il tient de luy. Et ceo est prove bien per les parols del brief de wast, quant le lessor ad cause de porter brieve de wast envers luy; lequel brieve dirra, que le lesee tient les tenements de le lessor pur terme de ans. Issint le brieve prova un tenure entre eux. Mes celui, que est tenant a volunt solongue le course del common ley, ne ferra fealtie; pur ceo que il n'ad ascun sure estate. Mes autrement est de tenant a volunt solongue le custome pel maner; pur ceo que il est oblige pur faire

ALSO, if a man letteth to another lands or tenements for terme of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also if a lease be made to a man for terme of yeares, it is said, that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of wast, when the lessor hath cause to bring a writ of wast against him; which writ shall say, that the lessee holds his tenements of the lessor for terme of yeares. So the writ proves a tenure betweene them. But he, which is tenant at will according to the course of the common law, shall not do fealty; because he hath not any sure estate. But otherwise it is of

(1) [See Note 93.]

(2) [See Note 94.]

faire fealtie a son seignior pur deux causes. L'un est per cause del custome; et l'auter est, pur ceo que il prist son estate en tiel forme pur faire a son seignior fealty.

of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is by reason of the custome; and the other is, for that he taketh his estate in such form to do his lord fealty.

[93. b.] “*SI un home lesse pur terme de vie sauns parler de rent, &c. il ferra fealtie, &c.*” And the reason is; because there is a tenure, (Ante 67. a. 68. and fealtie (as hath beene said) is incident to al manner of tenures; a.) and it is to be noted, that the law, for the suretie of the lord, that his tenant shall be faithfull and loyall to him, doth create such a service as the tenant shall be bound thereunto by oath.

“*Auxi si lease soit fait pur ans, &c. le lessee ferra fealty.*” For there also is a tenure between them. And Littleton's opinion in this case is holden for good law at this day (1).
 40. E. 3. 34.
 9. H. 6. 41.
 10. H. 6. 13.
 9. E. 4. 1.
 21. E. 4. 29. 5. H. 5. 12. 5. H. 7. 11.

“*Et ceo est prove bien per les parols del brieve, &c.*” Nota, the original writs are (as it were) the foundations and grounds of the law, and, as it appeares here by Littleton, are of great authority for the prooffe of the law in particular cases (2). Vid. Sect. 84.

“*Pur ceo que il n'ad sure estate.*” Therefore tenant at will shall not do fealty (as hath been said before); because the matter of an oath must be certaine. The rest of this Section needs no explication (3). (Ante 63. a. 5. Co. 10.)

(1) See ante 67. b. note 2.

(2) See ante 73. b.

(3) [See Note 95.]

CHAP. 6.

Frankalmoigne.

Sect. 133.

TENANT en frankalmoigne est, lou un abbe, ou prior, ou un auter home de religion, ou de saint eglise, tient de son seignior en frankalmoigne; que est a dire en Latin, in liberam eleemosynam. Et tiel tenure commençoit adeprimes en auncient temps en tiel forme. Quant un home en auncient temps fuit seisie de certain terres ou tenements en son demesne come de fee, et de mesmes les terres ou tenements enfeoffa un abbe et son covent, ou un pryor, &c. a aver et tener a eux et lour successeurs a tous jours en pure et perpetual almoigne ou en frankalmoigne; [ou per tielx parols, a tener de le grantor, ou de le feoffor, et de ses heires en frankalmoigne:] (1) en tiels cases les tenements sont tenus en frankalmoigne.

TENANT in frankalmoigne is, where an abbot, or prior, or another man of religion, or of holy church holdeth of his lord in frankealmoigne; that is to say in Latine, in liberam eleemosynam, that is, in free almes. And such tenure beganne first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the same land infeoffed an abbot and his covent, or prior and his covent, to have and to hold to them and their successors in pure and perpetuall almes, or in frankalmoigne; or by such words, to hold of the grantor, or of the lessor, and his heires in free almes: in such case the tenements were holden in frankalmoigne.

Braet. lib. 2.
cap. 5. and lib. 4.
ca. 2. Britton,
fo. 164, 165.
Mirror, ca. 2.
sect. 18.
Glanvil. lib. 7.
ca. 1. & lib. 12
ca. 3. & 25.
Fleta, lib. 3.
ca. 5.
21. H. 7. 39.
29. E. 3. 14.
8. H. 6. 23.
12. H. 8. 8.
(4. Co. 104.)

“UN abbe, prior, ou auter home de religion, ou de saint eglise.” It is to be observed, that of ecclesiasticall persons some be regular, and some be secular. They be called regular, because they live under certain rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *home de religion*, a man of religion, or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries, they are for distinction sake called secular, as bishops, deanes, and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *de saint eglise*, of holy church; and none of these are in law said to be *homes de religion*, or religious.

[94. a.]

Where *Littleton* saith (*infeoffa un abbe et son covent*) his meaning is, that the abbot only is infeoffed: for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeyes, priories, monasteries, and other religious houses of monkes, canons, friers and nuns, &c. have been dissolved, and their possessions given to the crowne (2).

See the Statutes
of 27. H. 8. not
printed, but in
the abridgement.
31. H. 8. cap. 13.
and 32. H. 8. ca. 24, &c. Vide Sect. 530.

(4. Inst. 321.)

The ecclesiasticall state of *England*, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces,

(1) The words between brackets are in L. and M. but not in Roh.

(2) The student will find a good history of the dissolution of monasteries in England

in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.

provinces, or archbishopsricks, (viz.) of *Canterbury* and of *Yorke*. The archbishop of *Canterbury* is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of *Yorke* *Primas Angliæ*. Each archbishop hath within his province suffragan bishops of several diocesses (3). The archbishop of *Canterbury* hath under him within his province, of ancient foundations, viz. *Rochester* his principall chaplaine, *London* his deane, *Winchester* his chancellor, *Norwich*, *Lincolne*, *Ely*, *Chichester*, *Salisbury*, *Exeter*, *Bathe* and *Wells*, *Worcester*, *Covenry* and *Litchfield*, *Hereford*, *Landaffe*, *St. David*, *Bangor*, and *St. Asaph*, and four founded by king *Henry 8.* erected out of the ruins of dissolved monasteries (that is to say) *Gloucester*, *Bristow*, *Peterborow* and *Oxford*. The archbishop of *Yorke* hath under him four, (viz.) the bishop of the county palatine of *Chester*, newly erected by king *Henry 8.* and annexed by him to the archbishopricke of *Yorke*, of the county palatine of *Durham*, *Carlisle*, and the isle of *Man*, annexed to the province of *Yorke* by *H. 8.* but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishopsricks and bishopsricks of *England* were founded by the kings of *England*, to hold by barony, as hereafter shall be said (4). * And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of *Canterbury* hath the precedencie, next to him the archbishop of *Yorke*, next to him the bishop of *London*, and next to him the bishop of *Winchester* (5), and then all other bishops of both provinces after their ancientnesse.

Matth. Parker de vitis archiepiscoporum. Lindwood. Camden Britannia. Vid. Rot. Parliam. anno 36. H. 8. 1. E. 6. 5. E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33. H. 8. ca. 31. Camden ubi supra. 26. H. 8. first-fruits and tenths. Vid. Sect. 137.

* 3. Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31. H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi*; and every archdeaconry is parted into deanries; and deanries again into parishes, townes and hamlets. And thus much, for the better understanding of our author, and how the state ecclesiasticall standeth at this day, shall suffice.

Vide more hereof, Sect. 180. 528. 648, &c.

“*Frankalmoigne, que est a dire en Latine, in liberam eleemosinam,*” in *English*, in free almes. There is an officer in the king's house called *eleemosinarius*, vulgarly called the king's almoner (whose office and duty is excellently described in ancient authors), viz. *fragmenta diligenter colligere, et diligenter distribuere singulis diebus egenis; ægrotos et leprosos, incarceratos, pauperesque viduas, et alios egenos vagosque in patriâ commorantes charitativè visitare: item equos relictos, robas, pecuniam, et alia ad eleemosinam largita recipere, et fideliter distribuere. Debet etiam regem super eleemosinæ largitione, crebris summonitionibus stimulare, præcipuè diebus sanctorum, et rogare ne robas suas, quæ magni sunt pretii, histrionibus, blanditoribus, accusatoribus, seu ministrallis, sed ad eleemosinæ suæ incrementum, jubeat largiri* (6).

Fleta, lib. 2. cap. 23.

All ecclesiasticall perions may hold in frankalmoign, be they secular or regular; and no lay person can hold in frankalmoign. This adjective (*liber*) doth distinguish many things in law from others; as here, *libera eleemosina* are words appropriated to this case, and do distinguish it from a tenure by divine service; *liberum tenementum*, from a tenure in villenage, by copyhold or base tenure; *liberum fio-*

Vide Sect. 1. B. act. 1. 4. 37. 38. Britton, cap. 32.

(3) [See Note 96.]

(5) [See Note 97.]

(4) See ante 70. b. note 2. post. 164. a.

(6) [See Note 98.]

Britton, cap. 66.
 Bract. lib. 4.
 F. N. B. 150.
 Bract. lib. 4.
 fol. 288, 247, 292.
 Brit. fol. 245.
 Fleta, lib. 5. cap.
 11. Fortescue,
 c. 26. 24. E. 3. 34.
 43. E. 3. Conspir.
 11. 27. Ass. 59.
 Stanf. 175. Vide
 Sect. 199. Fleta,
 lib. 1. cap. 47.

dum, franke fee, from a tenure in ancient demeane; *liberum maritagium*, from other estates taile; *libera firma*, frank ferme, when an estate is changed from knights service to socage; *liberum socagium*, from a tenure by service in chivalrie; *francus bancus*, to distinguish it from other dowers, for that it cometh freely without any act of the husband's or assignement of the heire; *libera lex*, to distinguish men who enjoy it, and whose best and freest birth-right it is, from them that by their offences have lost it, as men attainted in an attainder, in a conspiracie upon an indictment, or in a *præmunire*, &c. and so of *libera capella*, *francus plegius* frankpledge, *libera chasea* free chase, *liber burgus*, *liber aper*, *liber taurus*, and the like. But in a matter (some will say) of curiosity, this shall suffice; and yet seeing it tends to the better understanding (others say) it is tolerable.

Glanvil. lib. 7.
 ca. 1. fo. 44, 45.
 acc.

By the ancient common law of England, a man could not alien such lands as he had by descent, without the consent of his heire; (1) yet he might give a part to God in free almoigne, or with his daughter in free marriage, or to his servant in remuneratione servitii. Our old bookes described frankalmoign thus; when lands or tene-ments were bestowed upon God, (that is) given to such people as are consecrated to the service of God. In our ancient bookes these gifts of devotion were called Churchesset, or Churchfeed, *quasi semen ecclesiæ*; but in a more particular sense it is described thus: *certam mensuram bladi tritici significat, quam quilibet olim sanctæ ecclesiæ die sancti Martini, tempore tam Britonum quàm Anglorum, contribuerunt. Plures tamen magnates, post Romanorum adventum, illam contributionem secundum veterem legem Moysis nomine primitiarum dabant, prout in brevi regis Knuti ad summum pontificem transmissio continetur, in quo illam contributionem Churchfed appellant, quasi semen ecclesiæ.*

Britton, ca. 66.
 fol. 164. Bract.
 lib. 2. ca. 5. &
 10. F. N. B. 211.

Fleta, lib. 1.
 cap. 42.

“*Et tiel tenure.*” For albeit neither fealty, nor any other temporall service, is due, yet it is a tenure.

7. E. 4. 12.
 33. H. 6. 6, 7.
 39. H. 6. 29.
 [a] Mortmaine.
 Britton, fol. 32.
 & 90. Bracton,
 lib. 2. cap. 5.
 Fleta, lib. 3. cap.
 5. 11. H. 7. 12.
 (2. Ro. Abr. 61.)

“*En ancient temps.*” [a] That is to say, before the statutes of mortmaine, viz. *Magna Charta*, cap. 36. and 7. E. 1. *de religiosis*, &c. and before the statute of *quia emptores terrarum*, as shall be hereafter in his proper place said in this Chapter (2).

39. H. 6. 30. b.

“*Enfeoffa un abbe et son covent, &c.*” Albeit the covent be dead persons in law, and the abbot only capable (as before is said), yet if the feoffment be made to an abbot and covent, the feoffment is good, and the state vesteth only in the abbot. And note a man may infeoffe an abbot, a bishop, a parson, &c. or any other sole body politique, by deed or without deed, in free almes; and so may a gift in frankmarriage be made without deed also; but if lands be given to a deane and chapter, or any other corporation aggregate of many, there the gift must be by deed (3).

(1. Ro. Abr.
 § 32.)

Vid. Litt. in the
 Chapter of Fee
 simple, Sect. 1, 2.

“*A aver et tener a eux et a leur successeurs.*” For in case of an abbot or prior and covent regularly a fee simple doth not passe without this word (successeurs); (4) for the diversity standeth thus betweene a corporation aggregate of many capable persons, and a sole corporation. As if lands be given to a deane and chapter, they have

(1) See Wright's Ten. 167.
 (2) See post, Sect. 140.

(3) [See Note 99.]
 (4) [See Note 100.]

have a fee simple without this word (successors), for that the body never dies; but if lands be given to a bishop, parson, or any other sole corporation, who after their deceases have a succession, there without this word (successors) nothing passeth unto them but for life (5). But of corporations aggregate of many, there is a diversity when the head and body both are capable, as in the case of deane and chapter, and when one (as hath been said) is onely capable, as in case of abbot or prior and covent; but yet out of the generall rules, the case of frankalmoign is excepted, as hereafter shall be said. Also lands must be given to a corporation aggregate of many by deed; but to a sole corporation it may be granted without deed.

Bracton, lib. 2. cap. 10. Potest donatio fieri in liberam elemosinam ecclesiis cathedralibus, conventualibus, parochialibus, et viris religiosis.

“*En pure et perpetuall almoigne.*” Here it appeareth, that a tenure in frankalmoigne may be created without this word (*libera*), for *pura* implyeth as much.

“*Ou en frankalmoigne.*” But one of these words, either *pura* or *libera*, must be used, or else it is no tenure in frankalmoigne.

“*Ou per ceux parolx, a tener de le grantor ou feoffor et ses heires en frankalmoigne.*” Here it appeareth, that by these words a fee simple passeth without this word (successors), albeit it be in case of a sole corporation. For as in case of a gift in frankmariage, an estate taile passeth to the donees without the words (of the heires of their two bodies) as hath beene said in the Chapter of Fee taile; so in case of a gift in frankalmoigne (which may be resembled to a divine marriage), a fee simple passeth, as hath bin said, though it be in case of a sole corporation, without this word (successors). And besides, grants in frankalmoigne are ancient grants, as hath beene said, and therefore shall be allowed, as the law was taken, when such grants were made.

39. H. 6. 30.

35. H. 6. 56.
7. E. 4. 11.
Vid. Bract. lib.
2. ca. 10.

35. H. 6. 56.
7. E. 4. 11.
Bract. ubi supr.
44. E. 3. 24.
20. H. 6. fol. 36.

38. E. 3. 4. 2.
14. H. 6. 12.
10. H. 7. 13.
16. H. 7. 9.
18. E. 3. Conu-
sans 39. 33. H. 6.
22. 17. E. 3. 51.
6. E. 3. 54. &c.
Tr. 5. H. 3. Rot.
4. in Scaccario.
The prior of
Dunstable's case.

[95. a.]

Sect. 134.

EN mesme le manner est, lou terres ou tenements fueront grant en ancien temps a un deane et chapter et a lour successors, ou a un parson d'un esglis et a ses successors, ou a aucun auter home de saint esglis et a ses successors, en frankalmoigne, si il avoit capacity d'apprender tiels grants ou feoffments, &c.

IN the same manner it is, where lands or tenements were granted in ancient time to a deane and chapter and to their successors, or to a parson of a church and his successors, or to any other man of holy church and to his successors, in frankalmoigne, if he had capacitie to take such graunts or feoffments, &c.

“*EN mesme le manner, &c.*” Here Littleton, having put an example of bodies incorporate aggregate of many, whereof the head is onely capable, now putteth examples both of bodies incorpo-
rate

(5) [See Note 101.]

rate aggregate of many (all being capable) and of sole corporations of secular persons.

“*Deane*,” *Decanus*, is derived of the *Greek* word *δεκα*, that signifieth Ten, for that he is an ecclesiasticall secular governour, and was anciently over ten prebends, or canons at the least in a cathedral church, and is head of his chapter (1).

(3. Co. 73.)

“*Chapter, Capitulum, est clericorum congregatio sub uno decano in ecclesiâ cathedrali* (2).” And chapters be twofold, viz. the ancient and the later. And the later be also of two sorts. First, those which were translated or founded by king *Henry* the eight, in place of abbots and covents, or priors and covents, which were chapters while they stood; and these are new chapters to old bishopricks. Secondly, where the bishopricke was newly founded by *Henry* the eight (as *Chester, Bristow, &c.*) there the chapters are also new (3). There is a great diversitie betweene the commings in of the ancient deanes and of the new. For the ancient come in, in much like sort as bishops doe; for they are chosen by the chapter, by a *conge de essier*, as bishops be, and the king giving his royall assent they are confirmed by the bishop. But they which are either newly translated or founded, are donative, and by the king’s letters patents are installed, which are matters necessarie to be knowne (4).

“*S’il avoit capacite a prendre*.” For ecclesiasticall persons have not capacite to take in succession, unlesse they be bodies politique; as bishops, archdeacons, deanes, parsons, vicars, &c. or lawfully incorporate by the king’s letters patents, or prescription; as deanes and chapters, colledges, &c. But a colledge of religious persons, chauntry priests, and such like, that are not lawfully incorporated, but onely consist in vulgar reputation, have no capacity to take in succession. Therefore *Littleton* added materially (*s’il ad capacite a prendre*).

Sect. 135.

ET tiels, que teignent en frankealmoigne, sont obligé de droit devant Dieu de faire orisons, priers, mess. et autres divine services, pur les almes de leur grantor ou feoffor, et pur les almes de leur heires queux sont mortes, et pur le prosperite et bon vie et bon salute de leur heires que sont en vie. Et pur ceo ils ne ferront a nul temps aucun fealtie a leur seignior; pur ceo que tiel divine service est melieur pur eux devant Dieu, que aucun seans de fealtie; et auxi pur ceo que ceux parolx (frankealmoigne) exclude le seignior d’aver aucun

AND they, which hold in frankalmoigne, are bound of right before God to make orisons, prayers, masses, and other divine services, for the soules of their grantor or feoffor, and for the soules of their heires which are dead, and for the prosperity and good life and good health of their heires which are alive. And therefore they shall doe no fealty to their lord; because that this divine service is better for them before God, then any doing of fealty; and also because that these words (frankealmoigne) exclude

(1) [See Note 102.]

(2) [See Note 103.]

(3) [See Note 104.]

(4) [See Note 105.]

ascun terrein ou temporall service, mes d'aver tantsolement divine et spirituall service d'estre fait pur luy, &c.

clude the lord to have any earthly or temporal service, but to have onely divine and spirituall service to be done for him, &c.

IN this Section there appeareth a division of tenures, that is to say, some be spirituall, and some be temporall. And of spirituall some be incertain, as tenures in frankalmoign; and some be certain, as tenures by divine service. Again, divine service certaine is two-fold; either spirituall, as prayers to God; or temporall, as distribution of almes to poore people.

[95. b.]

“*Oblige de droit.*” That is, they are compellable by the ecclesiasticall law to doe it; and therefore it is said that they are bound of right, (for want of remedy and want of right is all one) and the common law (as here it appeareth) taketh knowledge of the ecclesiasticall law in that behalfe.

“*De faire orisons, prayers, messes, et auters divine services.*”

Since *Littleton* wrote, the lyturgie or booke of Common Praier and of celebrating divine service is altered. This alteration notwithstanding, yet the tenure in frankalmoigne remaineth; and such prayers and divine service shall be said and celebrated, as now is authorized: yea, though the tenure be in particular, as *Littleton* [a] hereafter saith, viz. *à chaunter un messe, &c. ou à chaunter un placebo et dirige*, yet if the tenant saith the praier now authorized, it sufficeth. And as *Littleton* [b] hath said before in the case of socage, the changing of one kinde of temporall services into other temporall services altereth neither the name nor the effect of the tenure; so the changing of spirituall services into other spirituall services altereth neither the name nor effect of the tenure. And albeit the tenure in frankalmoigne is now reduced to a certaintie contained in the booke of Common Prayer, yet seeing the originall tenure was in frankalmoigne, and the change is by generall consent by authority of parliament, [c] whereunto every man is party, the tenure remaines as it was before.

[a] Vide Sect. 137.

[b] Vide Sect. 119.

[c] 2. E. 6. c. 1.
5. & 6. E. 6.
cap. 1.
1. Eliz. ca. 2.

“*Ne ferraient ascun fealtie.*” Herein tenant in frankalmoigne differeth from a tenant in frankmariage; for tenant in frankmariage shall doe fealty, as hath beene said in the Chapter of Fee taile, but tenant in frankalmoigne shall not doe any, or any other thing, but *devota animarum suffragia*.

“*Tiel divine service est melieur pur eux.*” And it is also said in our bookes [d], *que frankalmoigne est le plus haute service*; and this was confessed by the heathen poet:

[d] 33. H. 6. 6.
13. E. 1. tit.
Count de
Voucher 118.

— fuit hæc sapientia quondam
Publica privatis jecernere, sacra profanis.

And certaine it is, that *nunquam res humanæ prosperè succedunt, ubi negliguntur divinæ.*

Sect. 136.

ET si tiels, que teignent leur tenements en frankalmoigne, ne voilont ou failont de faire tiel divine service (come est dit) le seignior ne poit eux distraîner pur cel non fesant, &c. pur ceo que n'est mis en certaine queux services ils doivent faire. Mes le seignior de ceo poit complaine a leur ordinary ou visitour, luy preyant, que il voiloit mitter punishment et correction de ceo, et auxy de provider que tiel negligence ne soit plus avant fait, &c. Et l'ordinary ou visitour de droit ceo doit faire, &c.

AND if they, which hold their tenements in frankalmoign, will not or faile to do such divine service (as is said) the lord may not distraine them for not doing this, &c. because it is not put in certainty what services they ought to do. But the lord may complaine of this to their ordinary or visitour, praying him, that he will lay some punishment and correction for this, and also provide that such negligence be no more done, &c. And the ordinarie or visitor of right ought to doe this, &c.

“**L**E seignior ne poet eux distraîner pur c'est non fesant, &c.”

“Distreine.” The word distresse is a French word. In Latine [96. a.] it is called *distictio, sive angustia*; because the cattell distrained are put into a strait, which we call a pown.

“Pur ceo que n'est mise en certaine queux services ils doivent faire.”

It is a maxim in law, that no distresse can be taken for any services that are not put into certaintie, [e] nor can be reduced to any certaintie; for, *id certum est, quod certum reddi potest*; for [f] *oportet quod certa res deducatur in iudicium*: and upon the avowry, damages cannot be recovered for that which neither hath certaintie, nor can be reduced to any certaintie. And yet in some cases there may be a certaintie in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certaine enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this uncertainty, being referred to the manor which is certaine, the lord may distrain for this uncertainty. *Et sic de similibus.*

[e] 35. H. 6. 37.
Br. tit. Offic. 4.
8. E. 3. 3. 66.
20. E. 3. Avowry
131.
(Cro. Cha. 383.
Cro. Jam. 585.
1. Sid. 263.)
[f] Brañton,
fol. 230. & 328.
(Post. 142.)
7. E. 3. 38.

(5. Co. 73. a.) “Poet complayner.” That is, to complaine in course of justice, according to the ecclesiasticall law.

[g] Mirror,
ca. 5. sect.
Brañton, lib. 5.
fo. 405, &c.
Fleta, lib. 2.
ca. 50. & 55.
lib. 6. ca. 38.
Britton, fo. 69,
70. W. 2. ca. 19.
17. E. 2. Bre.
822. Regist. 141.
Lindwood, tit.
de Constit. cap.
exter. Brañt. lib.
5 ca. 2. fo. 400. & 401, and the other authors above-said. (Post. 344. 9. Co. 39. 2. Inst. 398.)

“A leur ordinarie,” *Ordinarius*; and so he is called [g] in the ecclesiasticall law, *quia habet ordinarium jurisdictionem in jure proprio, et non per deputationem*. The name we have anciently taken from the canonists, and doe apply it onely to a bishop, or any other that hath ordinary jurisdiction in causes ecclesiasticall. In this case of *Littleton* it is to be observed, that the law doth appoint every thing to be done by those, unto whose office it properly appertaineth; and forasmuch as it belongeth to the office of the ordinary in this case to see divine service said, and to compell them to doe it by ecclesiasticall censures, therefore complaint is to be made unto him. Here and in the next Section it appeareth, that for deciding of controversies, and for dis-

tribution of justice within this realm, there be two distinct jurisdictions; the one ecclesiasticall, limited to certaine spirituall and particular cases (of the one whereof our author here speaketh); and the court wherein these causes are handled, is called *forum ecclesiasticum*. The other jurisdiction is secular and generall, for that it is guided by the common and generall law of the realme, *quæ pertinet ad coronam et dignitatem regis, et ad regnum in causis et placitis rerum temporalium in foro seculari*. So as in this case put by our author, the lord hath remedy for his divine service (albeit they issue out of temporall lands) in *foro ecclesiastico*, by the ecclesiasticall law; otherwise the lord should be without remedy. Yet the common law, to the intent that ecclesiasticall persons might the better discharge their duty in celebration of divine service, and not be intangled with temporall businesse, hath provided, that if any of them be chosen to any temporall office, he may have his writ *de clerico infra sacros ordines constituto non eligendo in officium*, &c. and thereof be discharged.

Regist. Orig.
187.

“*Ou visitor.*” That is, where the king or any of his progenitors is founder of the house, there the ordinary regularly shall not visit them, but the chancellour of *England* is appointed by law to be visitor of them; or where a speciall visitor is appointed upon the foundation, the complaint must be made to that visitor.

27. E. 3. 84, 85.
Regist. 40.
F. N. B. 42.
10. Eliz. Dier.
273. 16. E. 3.
Bre. 660.

21. E. 3. 60. 6. H. 7. 13. 8. Aff. 29. Brooke tit. Premunire 21.

“*De droit doit ceo faire.*” *De droit*, of right, (that is to say) he ought to doe it by the ecclesiasticall law in the right of his office.

And here is implied a maxime of the common law, that where the right (as our author here speaketh) is spirituall, and the remedy thereof onely by the ecclesiasticall law, the conusans thereof doth appertaine to the ecclesiasticall court.

(5. Co. 66. b.
2. Co. 43.
Plowd. 277.)

[26. b.]

Sect. 137.

MES si un abbe, ou prior, tient de son seignior per certaine divine service, en certaine d'esire fait, sicome a chaunter un messe chescun Vendredie en le semaine pur les almes, ut supra, ou chescun an a tiel jour a chaunter placebo et dirige, &c. ou de trover un chapleine de chanter messe, &c. ou de distributer en almoigne al cent poves homes cent deniers a tiel jour; en tiel case, si tiel divine service ne soit fayt, le seignior poet distreyner, &c. pur ceo que le divine service est mise en certaine per lour tenure, que le abbe ou prior devoit faire. Et en tiel case le seignior avera fealtie, &c. come il semble. Et tiel tenure n'est passe dit tenure en frankalmoigne, eins est dit tenure per divine service. Car en tenure en frankalmoigne

BUT if an abbot, or prior, holds of his lord by a certaine divine service, in certaine to be done, as to sing a masse everie Friday in the weeke, for the soules, ut supra, or every yeare at such a day to sing a placebo et dirige, &c. or to finde a chaplain to sing a masse, &c. or to distribute in almes to an hundred poore men an hundred pence at such a day; in this case, if such divine service be not done, the lord may distreyne, &c. because the divine service is put in certaine by their tenure, which the abbot or prior ought to doe. And in this case the lord shall have fealtie, &c. as it seemeth. And such tenure shall not be said to be tenure in frankealmoigne, but is called tenure by

*moigne nul mention est fait d'ascun man-
ner de service; car nul poet tener en
frankealmoigne, si soit expresse ascun
manner de certain service que il doit
faire, &c.*

by divine service. For in tenure in
frankealmoigne no mention is made
of any manner of service; for none
can hold in frankealmoigne, if there
be expresse any manner of certaine
service that he ought to doe, &c.

2. E. 3. 27, 28. " *P*ER certaine divine service d'estre fait, scome a chaunter un
messe, &c. ou de distributer en almoign, &c." Here be the two

(5. Co. 72. b.
F. N. B. 209. L.)

38. H. 6. 26,
27.

2. E. 6. ca. 13.
versus finem.

13. E. 3. ca. 5.

11. H. 7. c. 8.

1. El. ca. 2.

13. El. ca. 1.

23. El. ca. 1.

1. Ja. c. 11. & 12.

parts above mentioned, of divine service; and for this divine service
certaine, the lord hath his remedy, as here it appeares by our au-
thor, *in foro seculari*: for here it appears, that if the lord distreine for
not doing of divine service, which is certaine, he shall upon his
avowry recover dammages at the common law, that is, in the king's
temporal court, for the not doing of it. And if issue be taken upon
the performance of the divine service, it shall be tried by a jury of
twelve men; because albeit the service be spirituall, yet the dam-
mages are temporall, and so is the seigniory also.

And here is implied another maxime of the law, that where the
common or statute law giveth remedy *in foro seculari*, (whether the
matter be temporall or spiritual) the consens of that cause belong- (4. Co. 20.)
eth to the king's temporall courts onely; unlesse the jurisdiction of
the ecclesiasticall court be saved or allowed by the same statute, to
proceed according to the ecclesiasticall lawes.

" *Ou de distributer en almoigne al cent povres homes.*" Here note,
that the almes and reliefe of poore people, being a worke of charity,
is accounted in law divine service; for what herein is done to the
poore for God's sake, is done to God himselfe.

" *Poet distreiner, &c.*" Here (&c.) includeth many excellent
things, as when, where, and what may be distreyned, of all which
there is a taste given in their proper places.

[97. a.]

Brit. fo. 164.

" *En tiel case le seignior avera fealtie, &c. come semble.*" For, as
it hath beene said, fealty is incident to every tenure, saving the tenure
in frankalmoigne, and where the lord may distreine, there is fealty
due. And Britton calleth this tenure (by divine service) *aumone*,
and not *libera elemosina*. And, saith he, *tenure en aumone est terre ou
tenement que est done a aumone, dont ascun service est retenue al seoffor.*

" &c." And here (&c.) implyeth distresse, escheat, and the
like.

33. H. 6. fol. 6.
Brit. ca. 66.

(2. Inst. 460.)
13. E. 1. Count.
de Vouch. 118.

" *Et tiel tenure n'est pas dit tenure en frankalmoigne, eins est dit te-
nure per divine service, &c.*" And therefore our old bookes di-
vided spirituall service into free almes (which was free from any li-
mitation of certainty) and almes, because the tenants were bound to
certaine divine services.

" *S'il soit expresse ascun manner de certaine service.*" This holdeth
where the certainty is reserved upon the original grant. If lands
were given to hold *in liberâ elemosinâ*, reddendo a rent, it seemeth
the reservation of the rent to be void, * because it is repugnant and
contrary to the former grant *in liberâ elemosinâ*.

* 13. H. 4. tit.
Meine 74.

50. E. 3. 30.

19. E. 2. Avowrie 224. 32. E. 1. Taille 31. 26. Aff. 66. 4. H. 6. 17. Trin. 4. E. 3.
F. N. B. 252. f. 15. E. 3. Corody 4. 14. Aff. 22. 50. Aff. Pl. 6.

Vide

Vide Trin. 4 E. 3. and F. N. B. 231. f. that an abbot or prior that hold in frankalmoigne shall not be charged with a corody. Also lands holden in frankalmoigne cannot [1] be ancient demefne, in respect of charges incident thereunto.

[1] 32. E. 1.
Ant. Dem. 39.
8. E. 3. 5.

“*Que il doit faire, &c.*” Here by (*&c.*) is understood temporall or spirituall service also, which he ought to doe corporally, or render, or pay.

There were within this realme of *Englande* one hundred and eightene monasteries, founded by the kings of *Englande*; whereof such abbots and priors as were founded to hold of the king *per baroniam*, and were called to the parliament by writ, were lords of parliament, and had places and voices there. * And of them there were twenty-seven abbots and two priors, as by the rolles of parliament appeares. But since our author wrote, all these (as hath beene said) (1) are dissolved. King *Stephen* did found the abbey of *Féversham*, in *Kent*, *et dedit abbati et monachis, et successoribus suis, manerium de Feversham in com. Kancie, simul cum hundredo, &c. tenendum per baroniam, &c.* who albeit he held by a barony, yet because he was never (that I [m] finde) called by writ, he never sate in parliament.

(F. N. B. 232. a.)

* For example,
Rot. Parl.
5. H. 8. &
21. H. 8. &c.

All the archbishops and bishops of *England* have beene founded by the kings of *England*, and doe hold of the king by barony (as before hath beene said), (2) and have beene all called by writ to the court of parliament, and are lords of parliament. As (amongst many) take one notable record: [o] *Mandatum est omnibus episcopis, qui conventuri sunt apud Gloucestriam, die Sabbati in crastin. sancte Katharinæ, firmiter inhibendo, quod sicut baronias suas, quas de rege tenent, diligunt, nullo modo præsumant consilium tenere de aliquibus quæ ad coronam regis pertinent, vel quæ personam regis, vel statum suum, vel statum consilii sui contingunt, scituri pro certo, quod si fecerint, rex inde se capiet ad baronias suas. Teste rege apud Hereford, 23 Novemb. &c.* And the bishopricks in *Wales* were founded by the princes of *Wales*; and the principality of *Wales* was holden of the king of *England*, as of his crowne; and when the prince of *Wales* committed treason, rebellion, &c. the principality was forfeited, and the patronages of the bishops annexed to the crowne of *England*, so as the king is to have pensions for his chaplaines, and corodies for his vadelets, of them, as of bishops founded by himselve (3). And *vide Mich. 10. H. 4. Rot. 60. Wallia corum rege*, that the judgment was given accordingly against the bishop of *St. David's* in *Wales*, *per justiciarios de utroque banco et alios de perito consilio domini regis.* And the bishops of *Wales* are also called by writ to parliament, and are lords of parliament, as bishops of *England* be.

[m] Canc. Pas.
30. E. 1. coram
rege this founda-
tion is so plead-
ed.

(Post. 134. a.
344. a.)

[o] Ex rot. pat.
de anno 18. H. 3.
m. 17.

10. H. 4. fo. 6. b.

(1) See ante 94. a.

(2) See ante 70. b. and note 2. there.

(3) [See Note 106.]

Sect. 138.

ITEM, si soit demande, si tenant en frankmariage ferra fealtie a le donor ou a ses heires devant le quart degree passe, &c. il semble que cy. Car il n'est pas semble quant a cel entent a tenant en frankalmoigne; pur ceo que tenant en frankalmoigne ferra per cause de son tenure divine service pur son seignior, come devant est dit; et ceo il est charge a faire per la ley del saint eglise, et pur ceo il est excuse et discharge de fealtie: mes tenant en frankemariage ne ferra pur son tenure tiel service; et s'il ne ferra fealtie, donque il ne ferra a son seignior ascun manner de service, ne spirituall ne temporal, lequel serroit inconvenient et encounter reason, que home ferra tenant d'estate d'enheritance a un auter, et encore le seignior avera nul manner de service de luy. (1) Et issint il semble que il ferra fealtie a son seignior devant le quart degree passe. Et quant il ad fait fealty, il ad fait tous ses services.

ALSO, if it be demanded, if tenant in frankmariage shall do fealty to the donor or his heires before the fourth degree be past, &c. it seemeth that he shall. For he is not like as to this purpose to tenant in frankalmoign; for tenant in frankalmoign by reason of his tenure shall do divine service for his lord, as is said before; and this he is charged to do by the law of holy church, and therefore he is excused and discharged of fealty: but tenant in frankmariage shall not do for his tenure such service; and if he doth not fealty, he shal not do any manner of service to his lord, neither spiritual nor temporall, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance to another, and yet the lord shall have no manner of service of him. And so it seemes he shall do fealtie to his lord before the fourth degree be past. And when he hath done fealtie, he hath done all his services. [97. b.]

V. Sect. 87.
136. 201. 265.
440. 478. 665.
722.
40. Aff. 27.

Littleton fo. 50.
b. 42. E. 3. 5.
28. E. 3. 395.
20. H. 6. 28.
(Ante 23. a.)

“**L**EQUEL ferra inconvenient, &c.” An argument drawne from an inconvenience is forcible in law, as hath beene observed before, and shall be often hereafter. *Nilil quod est inconveniens, est licitum.* And the law, that is the perfection of reason, cannot suffer any thing that is inconvenient.

It is better, saith the law, to suffer a mischief that is peculiar to one, then an inconvenience that may prejudice many. See more of this after in this Chapter.

Note, the reason of this diversitie betweene frankalmoigne and frankmariage, standeth upon a maine maxime of law, that there is no land that is not holden by some service spirituall or temporall; and therefore the donee in frankmariage shall do fealty, for otherwise he should doe to his lord no service at all; and yet it is frankmariage, because the law createth the service of fealty for necessity of reason, and avoiding of an inconvenience. But tenant in frankalmoigne doth spirituall and divine service, which is within the said maxime, and therefore the law will not cohort him to do any temporall service. See the next Section.

“*Et encounter reason.*” And this is another strong argument in law, *Nilil quod est contra rationem est licitum*; for reason is the life of the

(1) Come il semble, L. and M.

the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *Nemo nascitur artifex*. This legall reason *est summa ratio*. And therefore if all the reason that is disperfed into so many severall heads, were united into one, yet could he not make such a law as the law of *England* is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the gouvernement of this realme, as the old rule may be justly verified of it, *Neminem oportet esse sapientiores legibus*: no man, out of his own private reason, ought to be wiser than the law, which is the perfection of reason.

[98. a.]

Sect. 139.

ET si un abbe tient de son seignior en frankalmoigne, et l'abbe et le covent south lour common seale alien mesmes les tenements a un seculer home en fee simple, en ceo cas le seculer home ferra fealtie a le seignior; pur ceo que il ne poit tener de son seignior en frankalmoigne. Car si le seignior ne doit aver de luy fealtie, donque il avera nul manner de service, que serroit inconvenient, ou il est seignior, et le tenement est tenu de luy.

AND if an abbot holdeth of his lord in frankalmoign, and the abbot and covent under their common seale alien the same tenements to a secular man in fee simple, in this case the secular man shall doe fealty to the lord; because he cannot hold of his lord in frankalmoigne. For if the lord should not have fealtie of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

THIS case is worthy of great observation; for hereby it appeareth, that albeit the alienors held not by fealty nor any other terrene service, but onely by spirituall services, and those incertaine, yet the alienee shall hold by the certaine service of fealty, (and of this opinion is *Littleton*, agreeable with our bookes in former authorities) for the law createth a new temporall service out of the land to be done by the alienee, wherewith the abbot was not formerly charged, for the avoyding of an inconvenience, viz. that the feoffee should do no manner of service, and consequently that the land should be holden of no man. Wherein it is to be remembered, that (as hath bin said before) all the lands and tenements in *England*, in the hands of any subject, are holden of some lord or other, and that every tenant must do some kinde of service; and that all lands and tenements are holden either mediately or immediately of the king, for originally all lands and tenements were derived from the crown. And it is to be observed, that when the law createth any new tenure, it is the lowest, (viz. tenure in socage) and with the least service that can be done, and neereft to the freedome of the former service: as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoigne; for if it should create any other service, it must create fealty also. And the law, accord-

ing

31. E. 3. Cessavit
22. 33. H. 6. 67.

21. E. 4. 11.

9. Co. 123.

Anth. Lowe's
case.

(2. Inst. 502.

3. Co. 3. b.)

(Ante 1. 2. Inst.
501.)9. Co. 123. in
Anth. Lowe's
case.

42. Aff. Pl. 6.
Britton, 164. b.

ing to equity and justice, giveth this fealty to the lord, of whom the land was before holden in frankalmoigne. And lastly, the law so abhorreth an inconvenience, as that it createth out of the land a new service for avoyding thereof. It appeareth by our bookes, that a feignory in frankalmoigne may be granted over, and consequently the tenant shall hold of the grantee by fealty only; and therefore Britton said well, that no service could be demanded of a tenant in frankalmoigne, *tant come les terres remaine en les maines les feoffees.*

Sect. 140.

ITEM, si home graunta a cel jour a un abbe, ou a un prior, terres ou tenements en frankalmoigne, ceux parolx (frankalmoigne) sont voides; pur ceo que il est ordeine per le statute que est appelle quia emptores terrarum (quel estatute fuit fait anno 18. Ed. 1.) que nul poit aliener ne graunter terres ou tenements en fee simple a tener de luy mesme. Issint si home seisie de certaine tenements, queux il tient de son seignior per service de chivaler, et a cel jour il, &c. granta per licence mesmes les tenements a un abbe, &c. en frankealmoigne, l'abbe tiendra immediatment mesmes les tenements per service de chivaler de mesme le seignior de que son grantor tenoit, et ne tiendra my de son grantor en frankalmoigne, per cause de mesme le statute. Issint que nul poit tener en frankalmoigne, si non que soit per title de prescription, ou per force de graunt fait a ascun de ses predecessors devant que mesme le statute fuit fait. Mes le roy poit doner terres ou tenements en fee simple a tener en frankalmoigne, ou per auters services; car il est hors de cas del estatute.

ALSO, if a man grant at this day to an abbot, or to a prior, lands or tenements in frankalmoigne, these words (frankalmoign) are voide; for it is ordained by the statute which is called quia emptores terrarum, (which was made anno 18. E. 1.) that none may alien nor grant lands or tenements in fee simple to hold of himselfe. So that if a man seised of certain tenements, which he holdeth of his lord by knights service, and at this day he, &c. granteth by licence the same tenements to an abbot, &c. in frankalmoigne, the abbot shall hold immediately the tenements by knights service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoigne, by reason of the same statute. So that none can hold in frankalmoigne, unlesse it be by title of prescription, or by force of a grant made to any of his predecessors before the same statute was made. But the king may give lands or tenements in fee simple to hold in frankalmoigne, or by other services; for he is out of the case of that statute.

[98. b.]

“ORDEINE per le estatute.” Here it appeareth by the authority of Littleton, that this is a statute, and yet the king alone speaketh, viz. *Dominus rex in parlamento suo, &c. ad instantiam magnatum regni sui concessit, providit et statuit.* But because it is *dominus rex in parlamento, &c. concessit*, it is as much in this case (being an ancient statute) as *dominus rex autoritate parlamenti concessit*. Secondly, it is, (amongst other acts of parliament) entred into the parliament roll, and therefore shall be intended to be ordayned by the king, by the consent of the lords and commons in that parliament assembled. Thirdly, it is a generall law, whereof the judges may

Vid. 8. Co. the
Prince's case.

may take knowledge, and therefore it is to be determined by them, whether it be a statute or no (1). Now for the divers formes of acts of parliament, you may read them in the Prince's case, *ubi supra*.

"*Appel quia emptores terrarum.*" This statute is called so, because the statute beginneth with these words, *Quia emptores terrarum*. (Post. 143. 2. Inf. 500.)

"*Nul poet aliener, &c. terres in fee simple a tener de luy mesme.*"

This is justly inferred upon the statute; but the letter of the statute is, that *feoffatus teneat terram illam de capitali domino, &c.* So as by the authority of *Littleton*, he that citeth a statute, is not bound to recite the very words thereof, so long as he misseth not of the substance and necessary consequence thereupon; and yet the safer way is to vouch the words of a law, as they be.

"*Granta per licence mesme les tenements, &c.*" Here *Littleton* speaketh of a licence, or a dispensation within the said statute of *quia emptores terrarum* (and mentioneth no other statute) which may be done by the king and all the lords immediate and mediate; for it is a rule in law, *alienatio licet prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri*, and *quilibet potest renunciare juri pro se introducto*; and the licence of lords immediate and mediate in this case shall enure to two intents, viz. to a dispensation both of the statute of *quia emptores terrarum*, and of the statutes of mortmain; as *Littleton* here implyeth, because their deedes shall be taken most strongly against themselves (1). But it is a safe and good policy in the king's licence to have a *non obstante* also of the statutes of mortmain, and not only a *non obstante* of the statute of *quia emptores terrarum*. But it appeareth by *Littleton* (which is a secret of law) that there needeth not any *non obstante* by the king of the statutes of mortmain, for the king shall not be intended to be misconfant of the law; and when he licenseth expressly to alien to an abbot, &c. which is in mortmain, he needs not make any *non obstante* of the statute of mortmain, for it is apparent to be granted in mortmain, and the king is the head of the law, and therefore *presumitur rex habere omnia jura in scrinio pectoris sui*, for the maintenance of his grant to be good according to the law, for which cause of purpose *Littleton* maketh no mention of any licence in mortmain. *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.*

"*L'abbe tiendra, &c. per ser vice chivaler.*" For although by the death of the abbot there is neither ward, mariage, nor relief due, yet he holdeth by knights service, albeit the lord cannot have the fruit of it; and if the abbot, with the consent of the convent, alien the land over to a man and his heires, there is the ward, mariage, and reliefe revived. But by prescription (as it hath been said) the successor of an abbot may pay reliefe. An abbot or prior, &c. that holdeth lands by knights service, albeit he ought not in respect of his profession to serve in warre in proper person, yet must he find a sufficient

13. E. 3. tit.
Release 33.
27. H. 8.
F. N. B. 211. I.

44. Aff. Pl. 19.
9. E. 4. b. 11.
Pl. Com. 502,
503. Grendon's
case. Vide 10.
Co. 25, 26. 31.
& 110. Vide
Sect. 686.
(5. Co. 56.
7. Co. 14.)

(Ante 70. b.)
Lit. fol. 20. a.
(2 Ro. Abr.
518.)
8. R. 2. Relief 14.
3. H. 4. 2. a.
(Ante 84. a.)
Vide Little.
fol. 20.

[99. a.]

(1) [See Note 107.]

(1) [See Note 108.]

ficient man, conveniently arrayed for the warre, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession doth not priviledge him, but that the king's service in his warre must be done, that belongeth to his tenure.

[m] 1. & 2. Ph. time, or by his last will in writing, [m] give lands, tenements, &c. to any spirituall body politick or corporate, to be holden of himselfe in frankalmoigne, or by divine service, as by the statute of 1 and 2 Phil. & Marie (which indured for twenty years) appeareth; which statute, since that time, hath beene favourably and benignely expounded.

11. E. 4. 4. "*Iffint que nul poet tener en frankalmoigne, si non que soit per tittle de prescription, &c.*" It is to be understood, that a man seised of lands may at this day give the same to a bishop, parson, &c. and their successors in frankalmoigne, by the consent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet potest renunciare juri pro se introducto*.

27. H. 8. 2. E. 2. So if an ecclesiasticall person hold lands by fealty and certaine rent, the lord at this day may confirme [n] his estate, to hold to him and his successors in frankalmoigne; for the former services be extinct, and nothing is reserved but that he holds of him, and so he did before.

Avowrie 185. "*Mes le roy poet, &c. car il est hors de case del statute.*"

11. Co. 66. It is cleere that the king is out of the case of the statute: for the Magdalen Colledge case. statute is, *quod feoffatus teneat terram illam, &c. de capitali domino feodi, &c.* and this cannot be intended of the king, who is superior to all, and inferiour to none, but where the king is bound by acts of parliament and where not. Vide 11. Co. 66. Magdalen Colledge case.

Sect. 141.

ET nota, que nul poet tener terres ou tenements en frankalmoigne, forspriſe del grantor, ou de ſes heires. Et pur ceo il eſt dit, que ſi ſoit ſeignior meſne et tenant, et le tenant eſt un abbe, que tient de ſon meſne en frankalmoigne, ſi le meſne devy ſans heire, donque le meſnaltie deviendra par eſcheate al dit ſeignior paramount, et l'abbe adonque tient de luy immediate per fealtie tantum, et ferra a luy fealty; pur ceo que il ne puit tener de luy en frankalmoigne, &c.

AND note, that none may hold lands or tenements in frankalmoigne, but of the grauntor, or of his heires. And therefore it is ſaid, that if there be lord meſne and tenant, and the tenant is an abbot, which holdeth of his meſne in frankalmoigne, if the meſne die without heire, the meſnaltie ſhall come by eſcheate to the ſaid lord paramount, and the abbot ſhall then hold immediately of him by fealty only, and ſhall do to him fealty; becauſe he cannot hold of him in frankalmoign, &c.

14. E. 3. tit. Meſne, 7. "*FORSPRISE del grantor, ou de ſes heirs.*"

14. H. 3. tit. Diſclaim. Br. 33. The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to

[99. b.]

to any other, no more than a foundershipe of a house of religion, (which is intended to be in frankalmoigne, or homage ancestrel, or the writ of *contra formam feoffamenti*, or the writ of *contra formam collationis*, or any other incident to their inheritable blood. But it is no incident inseparable; for the lord may release to the tenant in frankalmoigne, and then the tenure is extinct, and he shall hold of the lord paramount by fealty, as in the case of *Littleton*, Sect. 139.

10. H. 7. 11. 28. Aff. 33. 18. E. 3. 18. 22. E. 3. 18. Corody Broke 5. 4. E. 2. Avowry 201, 202. 19. E. 3. *ibid.* 122. 11. E. 3. *ibid.* 100. 30. H. 6. 7. 33. H. 8. Dyer 51. F. N. B. 16. F. N. B. 211. c. 15. E. 3. Confirm. 8.

15. E. 3. Confirm. 8. 27. H. 8. b. Temps E. 1. Garr. 90. 45. E. 3. 23. 47. H. 3. Garr. 99. 11. H. 4. 52. 14. H. 4. 5.

“*Ou de ses heires.*” Here (or) hath the sense of (and); for a man cannot at this day grant lands in taile and reserve a rent to his heires, and exclude the grantor himselfe; for the heire cannot take any thing in the life of the ancestor, neither can the heire take any thing by descent, when the ancestor himselfe is seclused. But if a man had granted lands at the common law to hold of his heires, these words (to hold of his heires) are void, and he shall hold of the grantor as he held over, which he should have done, if he had made no reservation at all.

Vide 15. E. 4. (2. Ro. Abr. 447. contra.—Hob. 130. Post. 143. 213. b.)

33. E. 3. tit. Annuity 52. 3. Aff. Pl. 8, &c.

And albeit *Littleton* saith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by assent of his covent, or a bishop with assent of his chapter, and such like, by license as is aforesaid, have given lands in frankalmoigne, to hold of them and their successors; and as *Littleton* himselfe agreeth, the king may give land in frankalmoigne, in which case the land shall be holden of him, his heires and successors.

“*Et pur ceo est dit, si soit seignior mesne et tenant, et le tenant est un abbe, &c.*” By this it appeareth, that if the feignory be transferred by act in law to a stranger, and thereby the privity is altered, that the tenure in frankalmoigne is changed to a tenure in socage by fealty, as well as it appeareth before when the feignory or tenancy is granted to another; and the law in this case also createth a new fealty, wherewith the land was not charged before.

“*Donques le mesnaltie deviendra per escheat al dit seignior paramount.*” This new tenure, created by law, shall upon the escheate drowne the feignory; for alwaies the feignory neerer to the land drownes the feignory that is more remote off; and yet the lord in this case, to whom the mesnaltie is escheated, shall hold by the same services that he held before the escheat.

2. E. 4. 46. (2. Ro. Abr. 501. 513.) 7. E. 4. 12. a.

Sect. 142.

ET nota, que lou tiel home de religion tient ses tenements de son seignior en frankalmoign, son seignior est tenu per la ley de luy acquitter de chescun manner de service que ascun seignior paramount de luy voet aver ou demander de mesmes les tenements; et s'il

AND note, that where such man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquite him of every manner of service which any lord paramount will have or demand of him for the same tenements; and if he

s'il ne luy acquita pas, mes suffra luy d'estre distraine, &c. donque il avera envers son seignior un brieve de mesne, et recoversa envers luy ses damages et ses costes de son suit, &c. he doth not acquite him, but suffereth him to be distreyned, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of suit, &c.

“*H O M E de religion.*” And yet this case extendeth to all ecclesiasticall persons that hold in frankalmoigne, be they secular or regular; for the mesne ought to acquite all of them; for they be bound [a] to make praier for their founder, and his heires; and in consideration of those prayers, the founder, &c. is bound to pay to the chiefe lord all rents and services issuing out of that land, as it appeareth by that which followeth.

[a] Pl Com.
306. b. in Sha-
rington's case.
33. H. 6. 6.
39. H. 6. 29.
14. E. 3. Mesne
7.

[b] Fleta, lib. 2.
ca. 43. Britton,
fol. 58, 59.
Vide hereafter
in this Sect. in
brieve de Mesne
[c] Vide Sect.
142. 540.

[d] 8. E. 2.
Corone 424.
40. E. 2. ibid.
232. Stanf. Pl.
Corone 105.

[e] 4. E. 3. 35. 17. E. 3. 44. 7. H. 4. 18. 34. H. 6. 47. 13. E. 4. 6. F. N. B. 136.
9. Co. 110, 111. in Tresham's case.

3 E. 3. 14. 77.
5. E. 3. 11.
4. H. 6. 28.
39. E. 3. 19.
11. H. 4. 52.
12. H. 4. 9.
14. H. 4. 17.
F. N. B. 136. b. h.
39. H. 6. 30.
17. E. 3. 39.

There be three kinds of acquitals. 1. An acquittal by deed. 2. An acquittal by prescription. 3. An acquittal by tenure: and by tenure foure manner of wayes. 1. By owelty of services, for service acquits service. 2. Tenure in frankalmoigne, whereof *Littleton* here speaketh. 3. Tenure in frankmarriage. 4. Tenure by reason of dower.

“*De chescun manner de service.*” [f] And yet not of services onely, as homage, fealty, rentworkes, and other services, but also of improvement of services; as if he be distreyned for reliefe, *aide pur file marier, aide pur faire fitz chivaler, &c.* Also for suite service to a hundred. [g] But for suit reall in respect of resciance within any hundred, leet, or turne, the mesne shall make no acquittal, for that is in respect of his person and resciancy.

[f] 39. H. 6.
31. a. 9. E. 4. 27.
F. N. B. 136. m.
17. E. 2. Mesne.
5. E. 3. 49.
* Braçton, lib. 2.
fol. 84.
[g] 4. E. 3. 42.
For this writ see
the Register fol.
Britton, fol. 58.

and F. N. B. fol. 135. Mirror, cap. 2. sect. 13. Braçton, lib. 2. fol. 84. Fleta, lib. 2. ca. 43. Westm. 2. cap. 9.

“*Brieve de mesne,*” *Breve de medio*, a writ of mesne, so called by reason of the words of the writ of mesne, which are, *unde idem A. qui medius est inter C. et præfatum B.* A. who is mesne between C. that is the lord paramount, and B. that is the tenant paravaile. And note, that there be fix writs in law, that may be maintained, *quia timet*, before any molestation, distresse, or impleading: as 1. A man may have his writ of *mesne* (whereof *Littleton* here speaks) before he be distreyned. 2. A *warrantia cartæ*, before he be impleaded.

3. A

[100. a.]

3. *A monstraverunt*, before any distresse or vexation: 4. *An audita querela*, before any execution sued. 5. *A curia claudenda*, before any default of inclosure. 6. *A ne injustè vexes*, before any distresse or molestation. And these be called *brevia anticipantia*, writs of prevention.

“*Et recovers vers luy ses damages.*” It is to be knowne, that there be two severall judgements in a writ of mesne, one at the common law, another by the statute of *W. 2. ca. 9.* At the common law he shall have judgment to recover his acquitall, and if he be distreyned or damnified, his damages and costs: and the proceffe at the common law was summons, attachment and distresse infinite, in the same county where the writ is brought. * The judgement by the said statute of *W. 2.* is a forejudger of the mesnalty, and that in two severall cases. One upon proceffe given by the said statute, viz. summons, attachment, and grand distresse, and if he commeth not, and the writ be returned, he shall be forjudged. The other case is, where the tenant recovereth his acquitall in a writ of mesne, if he be not acquitted afterwards, he shall have a writ of *distringas ad acquietandum* against the same mesne, and if he commeth not, he shall be forjudged by his default of the mesnalty; and so if he commeth, and it be found against him by verdict, he shall be forjudged: but forjudger in that case is not given against his heire, for that the statute speaketh onely of the mesne, and not of his heires. And the judgment in case of forjudgement is, *quòd T. (le mesne) amittat servitia de A. (le tenant) de tenementis prædictis, et quòd amissò prædicto T. præfat’ R. (le seignior paramount) modo sit attendens et respondens per eadem servitia per que T. tenuit.* The said statute, in case of forjudgement, doth not bind a feme covert; and yet if such a judgement be given against a baron and feme, it is not void, but erroneous, and to be reversed in a writ of error. And so a forjudgement against a tenant in taile shall binde the issue in taile in an avowry, untill he reverseth it by error. If two joyntenants bring a writ of mesne, and the one is summoned and severed, the other cannot forjudge the mesne; for he ought to be attendant to the lord paramount, as the mesne was, and that cannot he be alone. And so it is if there be two joyntenants mesnes, and in a writ of mesne brought against them, one maketh default, and the other appeares, there can be no forjudger.

oo. b.] If the tenant be disseised, and the disseisor in a writ of mesne forjudge the mesne, this shall not bind the disseisee. And so if the mesne be disseised, and a forjudgement is had against the disseisor, this doth not bind the disseisee; for the words of the said statute are, *quando tenens sine præjudicio alterius quàm medii attornare se potest capitali domino.*

But if the daughter, the sonne being *en venter sa mere*, be forjudged, it shall bind the son that is borne afterwards, because he had no right at the time of the forjudgment. And so if the tenant enter in religion, and his heire forejudgeth the mesne, and then the ancestor is deraigned, he shall be bound *causâ quâ supra.* If there be lord, prior mesne, and tenant, the mesne cannot be forjudged; because he alone can doe nothing to the prejudice or the diherison of his church: and the like law is of a bishop, parson, and the like.

No forjudgement can be, but when there is but one mesne betweene the lord distreyning and the tenant; because the tenant,

W. 2. ca. 9.
Vide 8. Co. 134.
Mary Shepley's
case.

* Braſton, lib. 2.
fol. 84.
Fleta, lib. 2.
cap. 43.

46. E. 3. 31.
18. E. 2. tit.
Mesne. F. N. B.
136. 2. H. 4. 7.
17. E. 3. Contra
formam Collat. 1.
F. N. B. 121.

(Post. 233. b.)
7. E. 3. 41. tit.
Mesne 18.
9. E. 2. ibid. 67.
14. E. 2. ibid. 70.
9. Co. 73. b.
Doct. Hussey's
case.

(10. Co. 134.)

16. E. 3. Judgm.
117.
(7. Co. 8. a.)
W. 2. ca. 9.

upon the forjudgement, cannot be attendant to the lord distreyning, in respect there is a mesne between them, and so the said statute provideth for in expresse termes.

Nota, the plaintife, in a writ of mesne, may chuse either proceffe at the common law, or upon the said statute of *W. 2.* Forjudgement is called *forisjudicatio*, and he that is forjudged *forisjudicatus*. And *Bracton* hath this writ, *Rex vicecomiti, &c. et non permittas, quòd A. capitalis dominus feodi illius habeat custodium hæredis, quia in curiâ nostrâ forisjudicatur de custodiâ, &c.* *Fleta* calleth it *abjudicationem*, and thereupon commeth *abjudicatus*; for he saith, *post proclamationem, &c. factam, abjudicetur medius de feodo et servitio suo* (1).

50. E. 3. 23.
F. N. B. 137.
Braet. l. 4. 256. b.
Brit. f. 58. b.
Flet. li. 2. ca. 43.

(1) [See Note 109.]

CHAP. 7.

Homage Auncestrel.

Sect. 143.

TENURE per homage auncestrel est lou un tenant tient sa terre de son seignior per homage, et mesme le tenant et ses auncestors, que heire il est, ont tenus mesme le terre del dit seignior et de ses auncestors, que heire le seignior est, de temps dont memorie ne court, per homage, et ont fait a eux homage. Et ceo est appel homage auncestrel, per cause de continuance, que ad est, per title de prescription, en le tenancie en le sanke le tenaunt, et auxy en le seignorie en le sanke le seignior. Et tiel service de homage auncestrel traite a luy garrantie, c'estascavoir, que le seignior, que est en vie et ad receive le homage de tiel tenant, doit garranter son tenant, quant il est implede de la terre tenus de luy per homage auncestrel.

TENANT by homage auncestrel is, where a tenant holdeth his land of his lord by homage, and the same tenant and his auncestours, whose heire he is, have holden the same land of the same lord and of his auncestors, whose heire the lord is, time out of memorie of man, by homage, and have done to them homage. And this is called homage auncestrell, by reason of the continuance, which hath beene, by title of prescription, in the tenancie in the blood of the tenant, and also in the seignorie in the blood of the lord. And such service of homage auncestrell draweth to it warrantie, that is to say, that the lord, which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage auncestrel.

“**P**ER title de prescription en le tenancy, en le sanke le tenant, et auxy en le seignior en le sanke le seignior.” Here Littleton doth not define what homage auncestrell is, but putteth an example in one case. For in the 146. Section it appeareth, that blood is not alwayes necessary on the lord's side. In this example here put, there must be a double prescription, both in the blood of the lord and of the tenant, and therefore I think there is little or no land at all at this day holdeth by homage auncestrel.

And hereof it is sayd, *Autant est le seignior tenus a son homage, come le homage a son seignior, forsque solement en reverence.* And herewith agreeth *Bracton: Est tanta et talis connexio per homagium inter dominum et tenentem, quod tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam.*

9. H. 3. Vouch. 277. 47. H. 3. Garr. 99. Temps E. 1. Garr. 90. 4. E. 2. Vouch. 245. 45. E. 3. 43. 11. H. 4. 50. 4. H. 6. 26.

Brit. fol. 170. 2.

Braet. fol. 78. Glanv. li. 9. ca. 4, 5, 6.

101. a.] “*Trait a luy garranty.*” Hereby appeareth, what a reverend respect the law hath to ancient inheritances continued in the blood of the lord and of the tenant; for in this example put, if the continuance hath not bin in the blood of both sides, no warrantie belongeth to homage auncestrel; but if ancient continuance hath been on both sides, [m] then such homage auncestrell draweth to it warranty; so as ancient continued inheritance on both parties hath more priviledge and account in law, then inheritances lately, or within memory acquired.

Vide Britton ubi supra. 14. H. 6. 25. 18. H. 6. 2. b. Glanvil. lib. 9. c. 4, 5, and 6. 9. H. 3. Voucher 277. 47. H. 3. Voucher 270, 271.

43. E. 3. 3. a. (F. N. B. 134. f.) [m] See the second Part of the Institutes upon the 6th chapter of the statute of Bigamie. (Post. 384. a.)

Lib. 2. Cap. 7. Of Homage Auncestrel. Sect. 144, 145.

18. H. 6. 2. b.
per Newton.

If the lord grant the services of his tenant by homage auncstrel, the tenant shall not be compelled in a *per quæ servitia* to atturue, unlessse the conusee will grant in court to warrant the land unto him.

9. H. 3.
Voucher 277.

If the tenant vouch by force of this warrantie in law, it is a good counterplea, that the tenant (or any one of his ancestors) *recessit de servitio suo, et fecit servitium suum A. B. sine aliquâ coactione de suâ propriâ voluntate.*

[a] 9. H. 3.
Voucher 277.
Temps E. 1.
Gar. 90.
45. E. 3. 23.
[b] Glanvil.
lib. 9. c. 4, 5.
and lib. 1. cap. 3.
Braſton, lib. 2.
fol. 83.

“*Et ad receive homage de tiel tenant.*” [a] So as before homage received, the tenant could not absolutely bind the lord to warranty, and therefore of ancient time there lay [b] a writ *de homagio capi-endo*, for the tenant against the lord, to compell him to receive his homage for the benefit of his warranty. Which writ you shall read in *Braſton* and [c] *Britton*, and the proceſſe, and manner of triall thereupon, and the same you shall finde in 47. H. 3.

[c] Britton, fol. 172, 173. 47. H. 3. Garrantie 99.

Sect. 144.

ET auxy tiel service per homage auncstrel traite a luy acquital, scil. que le seignior doit acquiter le tenant envers tous auters seigniors paramont luy de chescun manner de service.

Sect. 142. and
540.
(Ante 100.)

“*Traite a luy acquital.*” Of acquittall somewhat hath been said in the Chapter of Frankalmoigne.

AND also such service by homage auncstrell draweth to it acquittall, scil. that the lord ought to acquite the tenant against all other lords paramont him of every manner of service.

Sect. 145.

ET il est dit, que si tiel tenant soit emplede per un præcipe quod reddat, &c. et il vouche a garrantie son seignior, que vient eins per proces, et demanda del tenant que il ad de luy lier a garranty, et il monstre, comment il et ses auncstors, quel heire il est, ont tenuz sa terre del vouchee et de ses auncstors de temps dont memorie ne curt; et si le seignior, que est vouche, ne avoit resceive pas homage del tenant, ne d'aucun de ses auncstors, le seignior (s'il voit) poit disclaimer en le seigniorie, et issint ouste le tenant de son garrantie. Mes si le seignior, que est vouch, ad receive homage de le tenant, ou d'aucun de ses auncstors, donques il ne d'sclairera, mes il est oblige per la ley

AND it is said, that if such tenant be impleaded by a *præcipe quod reddat*, &c. and vouch to warrantie his lord, who commeth in by proces, and demands of the tenant what he hath to binde him to warranty, and he sheweth, how he and his ancestors, whose heire he is, have holden their land of the vouchee and of his ancestors time out of minde of man; and if the lord, which is vouched, hath not received homage of the tenant, nor of any of his ancestors, the lord (if he will) may disclaime in the seigniorie, and so ouste the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his ancestors, then

[101. b.]

ley de garranter le tenant ; et donque si le tenant perd sa terre en default del vouchee, il recouvrera en value envers le vouchee de terres et tenements, que le vouchee avoit al temps de le voucher, ou unques puis.

then he shall not disclaime, but he is bound by the law to warrant the tenant; and then if the tenant loseth his land in default of the vouchee, he shall recover in value against the vouchee of the lands and tenements, which the vouchee had at the time of the voucher, or any time after.

“*UN præcipe quòd reddat.*” This is understood of the king’s writ directed to the sherife of the county where the land lyeth, whereby the sherife is authorised to command the tenant of the land to yeeld the same to the demandant; and of these words of the writ (*præcipe quòd reddat*) the writ is so called. Writs of *præcipe* be of foure kindes, *præcipe quòd reddat*, *præcipe quòd faciat*, *præcipe quòd permittat*, and *præcipe quòd non permittat*, &c. as appeareth by the Register.

(Post. 139. b.)
Regist. 159.

“*Et il vouche a garrantie.*” *Avoucher* (in *Latin vocatio*, or *advocatio*) is a word of art, made of the verbe *voco*, and is in [*d*] the understanding of the common law, when the tenant calleth another into the court that is bound to him to warrantie, that is, either to defend the right against the demandant, or to yeeld him other land, &c. in value, and extendeth to lands or tenements of an estate of freehold or inheritance, and not to any chattel real personall or mixt, saving only in case of a wardship granted with warranty (as shall be said more at large in the Chapter of Warranties); for in the other cases concerning chattels, the partie, if he hath a warrantie, shall not vouche but have his action of covenant, if he hath a deed; or if it be by *parol*, then an action upon his case, or an action of deceit, as the case shall require. Now seeing that one *Latin*, *French*, or *English* word can have this particular signification, therefore the common lawyer (that I may speake once for all) is driven, as the professors of other liberall sciences use to doe, to use significant words framed by art, which are called *vocabula artis*, though they be not proper to any language. He that voucheth is called the voucher *vocans*, and he that is vouched is called vouchee *warrantatus*. [*e*] The proces whereby the vouchee is called, is a *summoneas ad warrantizandum*, whereupon if the sherife returneth that the vouchee is summoned, and he make default, then a [*f*] *magnum cape ad valentiam* is awarded; when if he make default againe, then judgement is given against the tenant, and he over to have in value against the vouchee. If the vouchee doe appeare, and after make default, then *parvum cape ad valentiam* is awarded; and if he make default againe, then judgement as before. But if the sherife returne, that the vouchee hath nothing, then after writs of *alias* and *pluries*, a writ of *sequatur sub suo periculo* shall be awarded; and if the like returne be made, then shall the demandant have judgement against the tenant; but he shall not have judgement to recover in value, because the vouchee was never warned, and it appeareth, that he hath nothing. But in the grand *cape ad valentiam*, it appeareth that he hath assets, and his making default after summons is an implied confession of the warranty. And it is called a *sequatur sub suo periculo*, because the tenant shall lose his land without any recompence in value, unless he upon that writ can bring in the vouchee to warrant the land unto him: and if, at the *sequatur sub suo periculo*, the tenant and the vouchee make default, and the demandant hath judgement against

[*d*] Mirr. cap. 5.
sect. 1. and 5.
Bract. li. 5.
fo 380, 381.
Brit. c. 75. de
Gar. Vouch.
Fleta, li. 6. c. 23,
24, 25, 26, &c.
optime. Lamb.
Expli. Verb.
Advocare.
(Post. 365. 389.
Hob. 3. 28.
Noy 131. 2. Ro.
Abr. 738.)

(Cro. Jam. 307.)

[*e*] V. Reg. Jud.
for all these
judiciall writs.

[*f*] V. Vet.
N. B. 179. 186.
39. E. 3. 28.
14. H. 6. 7.
17. E. 3. 41.
3. H. 4. 4.
11. H. 4. 72.
45. B. 3. 19.
F. N. B. 134.
135.
(Post. 393. a.)

(Post. 393.)

the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia cartæ*, and if he were impleaded by a stranger, he may vouche again; but if he had judgment to recover in value, he shall never have a *warrantia cartæ*, or vouche againe, for by this judgement to recover in value he hath benefit of the warrantie. And you shall finde in bookes a recovery with a single voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over; and so a treble voucher, &c. Againe, you shall finde there also a foraine voucher; and that is, when the tenant, being impleaded within a particular jurisdiction, (as in London or the like) voucheth one to warranty, and prayes that he may be summoned in some other county out of the jurisdiction of that court. This is called a foraine voucher, but might more aptly be called a voucher of a forainer, *de forinsecis vocatis ad warrantizandum*. Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for *caveat emptor*, as shall be said more at large in the Chapter of Warrantie in the Third Booke.

Glouc. c. 12.
F. N. B. 6. c.

(Cro. Jam. 4.
1. Ro. Abr. 96.
F. N. B. 94.)

Brit. 174.

“*Le seignior (s’il voet) poet disclaymer en le seignorie.*” *Disclaimer*, *disclamare*, is compounded of *de* and *clamo*, and signifieth utterly to renounce the seignorie.

[a] 47. H. 3.
Disclam. 35
16. H. 7. 1.
20. E. 2. tit.
Nuper Ob. 14.
F. N. B. 197.
& 151. b.

45. E. 3. 19.
21. E. 3.
50. E. 3. 23, &c.
(Doctr. Plac.
131.)

[b] 14. H. 3.
tit. Disclam.
B. 33.

[a] Note, there be divers kinds of disclaymer, that is to say, a disclaimer in the tenancie; a disclaimer in the bloud; and a disclaimer in the seignorie; whereof *Littleton* here putteth his case.

[b] But if the tenant in frankalmoigne bring a writ of mesne against his lord, the lord cannot disclayme in the seignorie; because he cannot hold of any man in frankalmoigne, but of his donor and his heires. And so note a diversity between a tenure in frankalmoigne, whereby divine service is maintained, and homage ancestrell, which respecteth temporall service. But if the lord will not disclayme in the seignory, in the case of homage ancestrell, then albeit he hath not received homage, he shall warrant the land.

47. H. 3. Dis-
claim. 35. Vide
Bract. l. 4. 252.
b. 16. H. 7. 1.
Brit. 172, 174.
(Doctr. Plac.
131.)

“*Si le seignior que est vouche ad receive homage, &c. il ne disclaymera.*” Therefore it is good for the tenant, to the intent to oust the lord of his disclaymer, in his voucher to allege, that the lord hath taken homage of him; and if he alledge it not, and the lord offer to disclayme, the tenant may counterplead the same by acceptance of homage. And the reason that the lord cannot disclayme in that case is, for that he hath accepted his humble and reverent acknowledgement, to become his man of life and member and terrene honour, and to be faithfull and loyall to him, for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclayme.

“*Que il avoit al temps del voucher.*” Hereby it appeareth, that the tenant shall not be driven to recover in value only those lands, which the lord had from that ancestor, which created the seignory, for that were in a manner impossible, for that the seignory must be created before time of memory; and the first creation of the seignory did not create the warranty, but the continuance of both sides time out of minde created the warranty. And that is the reason that
a writ

a writ of annuity shall not [c] lye againſt the heire by preſcription; becauſe it cannot be knowne, whether he hath any land by deſcent from the ſaid anceſtor, that firſt granted the annuity. And here is a point worthy of obſervation, that in the caſe of homage aunceſtrel, (which is a ſpecial warranty in law) by the authority of *Littleton*, the lands generally, that the lord hath at the time of the voucher, ſhall be liable to execution in value, whether he hath them by deſcent or purchaſe. But in the caſe of an expreſſe warrantie, the heire ſhall be charged but only for ſuch lands as he hath by deſcent from the ſame anceſtor which created the warranty.

Note what privilege this ancient warranty (created by operation of law) hath more than the expreſſe warranty. And ſo you may obſerve, that in this caſe *firmior et potentior eſt operatio legis quàm diſpoſitio hominis*.

“*Al temps de voucher ou unques puis.*” This is evident and worthy of diligent obſervation, viz. that the lands of the vouchee ſhall be liable to the warranty that the vouchee hath at the time of the voucher, for that the voucher is in lieu of an action; and in a *warrantia cartæ*, the land which the defendant hath at the time of the writ brought, ſhall be lyable to the warranty.

Upon a judgment in debt, the plaintife [d] ſhall not have execution, but only of that land which the defendant had at the time of the judgment, for that the action was brought in reſpect of the perſon, and not in reſpect of the land. But if an action of debt be brought againſt the heire, and he alieneth, hanging the writ, yet ſhall the land which he had at the time of the original purchaſe, be charged, for that the action was brought againſt the heire in reſpect of the land. [e] If a man be nonſuit, the land only which he had at the time of the amerſciament aſſeſſed, ſhall be charged, and not that which he had at the finding of the pledges. For the amerſciament is not in reſpect of the land, but of his want of proſecution, which was a default in his perſon. But the iſſues of a juror ſhall be levied upon the feoffee, albeit they were not loſt before the feoffment, becauſe he was returned and ſworne in reſpect of the land. Note the diverſity.

If a man give lands in fee with warranty, and binde certaine lands ſpecially to warranty, the perſon of the feoffor is hereby bound, and not the land, unleſſe he hath it at the time of the voucher.

[c] 46. E. 3. 5. b.
10. E. 4. 10. b.
19. H. 6. 74.
37. H. 6. 19.
5. H. 7.
F. N. B. 152.

28. E. 1. Vouch.
291. 9. E. 2.
War. Car. 20. 19.
Fines 127.

29. E. 3. 3.
18. E. 3. 1.
2. H. 4. 10.
23. E. 3. Recov.
invalu. 3. 16. E.
39. Vouch. 85.
19. E. 3. Vouch.
24. 22. E. 3.
Fitz. Nat. Bre.
134. f.
[d] 2. H. 4. 14.
42. E. 3. 1.
42. Aſſ. 17.
9. E. 2. tit.
Execut. 249.
(1. Ro. Abr.
898. 891, 892.)
[e] 22. Aſſ. pl.
32.
(Finch. L. 353.)

32. E. 1.
Voucher 292.
(2. Ro. Abr.
771.)

Sect. 146.

*E*T eſt aſcavoir, que en cheſcun cas ou le ſeignior poit diſclaimen en ſon ſeigniorie per la ley, et de ceo voit diſclaimen en court de record, ſon ſeigniorie eſt extinet, et le tenant tiendra del ſeignior procheine paramont le ſeignior que iſſint diſclaime. Mes ſi un abbe ou prior ſoit vouch per force de homage aunceſtrel, &c. comment que il ne unque priſt homage, &c. uncore il ne poit diſclaimen en tiel cas,

AND it is to be underſtood, that in every caſe where the lord may diſclaime in his ſeigniorie by the law, and of this he will diſclaime in a court of record, his ſeigniorie is extinet, and the tenant ſhall hold of the lord next paramount to the lord which ſo diſclaimeth. But if an abbot or prior be vouched by force of homage aunceſtrel, &c. albeit that he never tooke homage,

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cas, ne en nul autre cas; car ils ne poient anienter ou devester chose de fee, que ad este vestue en leur meason.

homage, &c. yet he cannot disclaime in this case, nor in any other case; for they cannot take away or devest a thing in fee, which hath beene vested in their house.

Vide Britton, fol. 58. 110. (Doctr. Plac. 133.) [f] 45. E. 3. 7. 22. E. 4. 35.

“ *SON seignorie est extincte, et le tenant tiendra de seignior prochain paramount, &c.*” Here two things are to be observed: first, that by this disclaymer in the seigniorie, the seigniorie is [f] extinct in the land.

Secondly, that after the disclaymer the tenant shall hold of the next lord paramount by the same services as the mesne so disclayming held before.

Vide Sect. 143.

“ *Si un abbe ou prior soit vouch, &c. comment, &c. uncore il ne poet disclaymer, &c.*” Here it appeareth of the lord’s side, that continuance of blood is not necessary; but yet there must be privy of succession time out of minde in one politicke body; for if that body be once dissolved, though a new one be founded of the same name, and all the possessions be granted to them, yet the homage ancestrell is gone. But if a prior and covent be translated, *concurrentibus hiis quæ in jure requiruntur*, to an abbot and covent, or to deane and chapter, there the homage ancestrell remaines; for though the name be changed, yet the body was never dissolved, but in effect it remaineth still. If the body politique were founded within time of memory, there cannot be homage ancestrell, for that continuance faileth; and though ancestor is ever properly applyed to a naturall body, yet it is called homage ancestrell when the tenure is of a body politique, for that it is ancestrell of the tenant’s side. But on the other side, an abbot or prior cannot hold by homage ancestrell; for, as appeareth by *Littleton*’s examples, it must ever be ancestrell on the tenant’s side. And where *Littleton* putteth his case of an abbot or prior, the same law is of a bishop, deane, archdeacon, prebend, parson, vicar, and the like. Another thing here to be observed is, that an abbot or prior cannot disclaime, &c. for regularly it is true, *quod meliorem conditionem ecclesiæ suæ facere potest prælatus, deterioorem nequaquam*; and againe, *ecclesiæ suæ conditionem meliorem facere possunt sine consensu, deterioorem non possunt sine consensu*. And therefore an abbot, prior, bishop, deane, archdeacon, prebend, parson, vicar, or any other sole corporation, that is seised *in autre droit*, cannot disclaime; because, as *Littleton* saith, they alone cannot devest any fee which is vested in their house or church. For the wisdome of the law would never trust one sole person with the disposition of the inheritance of his house or church. But an abbot and prior had their covent, the bishop his chapter, the parson and vicar their patron and ordinarie, and the like of other sole corporations, without whose assent they could passe away no inheritance.

[103. a.]

14. H. 6. 12.
2. H. 6. 9.
38. Aff. p. 22.
37. Aff. 6.
Co. 3. 73, &c.
Deane and
Chapter de
Norwich case.

40. E. 3. 27.
5. E. 4. 1.
6. E. 3. 51, 52.
(7. Co. 10, 11.)

10. E. 4. 2. a.
21. H. 7. 20.

“ *Ils ne poient anienter ou devester chose de fee, &c.*” These generall words have certaine exceptions; for in a *quo warranto*, at the suit of the king, against a bishop, abbot, or prior, for franchises and liberties, if the bishop, abbot, or prior, disclaime in them, this should binde their successors. If an abbot or prior had acknowledged the action in a writ of annuitie, this should have bound the successor; because

6. E. 3. 51, 52.

because he cannot falsifie it in an higher action, and there must be an end of suits. *Expedit reipublicæ, ut sit finis litium.* But if the abbot levie a fine, or acknowledge the action in a *præcipe quod reddat*, the successor shall be bound *pro tempore*, but he may have a writ of right, and recover the land.

“*Per force de homage ancestrell, &c.*” Here (&c.) implyeth or by any other warrantie [*i*], as by the reason, which our authour here yeeldeth, appeareth.

“*Chose de fee.*” [*k*] For if in an action of debt upon an obligation against an abbot, the abbot acknowledgeth the action, and dieth, the successor shall not avoid execution, though the obligation was made without the assent of the covent; for he cannot falsifie the recoverie in an higher action, *et res judicata pro veritate accipitur*, and this is but a chattell. And so it is of a statute or recognisance acknowledged by an abbot or prior.

38. E. 3. 33.
16. E. 3. tit.
Abbot 13.
19. E. 3. tit.
Abbot 12.
7. R. 2. Abbot 7.
12. H. 4. 11.
20. H. 6. fo.
ultimo. 4. H. 7. 2.
2. H. 4. 6.
34. Aff. p. 7.
14. E. 4. tit.
Abbot B.
8. E. 3. 28.
12. H. 8. 7.
[*i*] 12. H. 8. 7.
[*k*] 7. R. 2. tit.
Abbot 7. See
the bookes next
above.
(6. Co. 8. 2.)

Sect. 147.

ITEM, si home, que tient son terre per homage ancestrell, alien a un auter en fee, le alienee ferra homage a son seignior: mes il ne tient de son seignior per homage auncestrell; pur ceo que le tenancie ne fuit continue en le sanke de les auncesters l'alienee; ne l'alienee n'avera jammes garrantie de la terre de son seignior; pur ceo que le continuance del tenancie en le tenant et a son sanke per l'alienation est discontinue. Et sic vide, que si le tenant, que tient la terre per homage ancestrell de son seignior alien en fee, coment que il reprist estate de l'alienee arrere en fee, il tient la terre per homage, mes nemy per homage auncestrell.

ALSO, if a man, which holds his land by homage ancestrell, alien to another in fee, the alienee shall doe homage to his lord: but he holdeth not of his lord by homage ancestrell; because the tenancie was not continued in the blood of the ancestors of the alienee; neither shall the alienee have warrantie of the land of his lord; because the continuance of the tenancie in the tenant and to his blood by the alienation is discontinued. And so see, that if the tenant, which holdeth his land of his lord by homage ancestrell alieneth in fee, though he taketh an estate againe of the alienee in fee, yet he holds the land by homage, but not by homage ancestrell.

“**A**LIEN a un auter en fee.” For hereby the privy of the estate is altered, and the continuance of it in the blood of the tenant is dissolved. But if the tenant maketh a lease for life, or a gift in taile, this is a continuance of the privy and estate in the tenant in respect of the reversion that remaineth in him; for the fee, whereof *Littleton* heere speaketh, was not out of him. But if the tenant maketh a feoffment in fee upon condition, and dieth, his heire performeth the condition, and re-enteth, the homage ancestrell is destroyed in respect of the interruption of the continuance of the privy and estate; and this case was put and not denied in the argu-
ment

(Post. 202. 2.)

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[m] 1. Mich. 14. & 15. Eliz. ment [m] of the case betweene the Lord Cromwell and Andrewes, Mich. 14. & 15. Eliz. which I myselfe heard and observed. As if *cestuy que use* had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the land against the feoffees for ever, for that the estate and privitie was for the time taken out of the feoffees, and thereby dissolved for ever. But if the land were recovered against the tenant upon a faint title, and the tenant recover the same againe in an action of higher nature, there the homage auncstell remaines; for the right was a sufficient meane for the continuance. So it is if he had reversed it in a writ of error. [103. b.]

[n] 5. E. 3. per Cantrel. [n] If the alienee be impleaded in *Littleton's* case, and vouch the alienor that held by homage auncstell, albeit he commeth in by fiction of law to many purposes in privitie of his former estate, yet to this purpose he cannot come in as tenant by homage auncstell, because of the discontinuance of the estate and privitie, and as *Littleton* saith, the tenancie was not continued in the blood. [o] And *Britton* saith, *et come aucun nequedent soit vouche per homage, et le seignior tende de averrer, que le tenement, dount il vouche, fuit translate hors del sanke del primer purchasor, per feoffment ou per aucun auter translation, en tiel case soit le tenant charger de voucher son feoffor ou ses heires.*

38. E. 3. 26. 11. H. 4. 22. 17. E. 3. 47. 59. 73, 74. 26. E. 3. 56. 18. E. 3. 56. 10. E. 3. Voucher 87. 18. E. 3. 30. 44. E. 3. Litt. fol. 169.

“ *Coment que il reprist estate del alienee en fee, &c.*” For the cause aforesaid, in respect of the interruption of the privie and continuance of the estate. And herewith agreeth our bookes in cases of warranties in deed, or warranties in law. See more of this in the Chapter of Warranties.

Sect. 148.

ITEM, *il est dit, que si home tient sa terre de son seignior per homage et fealty, et il ad fait homage et fealty a son seignior, et le seignior ad issue fits, et devy, et le seigniorie descendist a le fits; en ceo cas le tenant, que fist homage al pere, ne ferra homage al fits; pur ceo que quant un tenant ad fait un foits homage a son seignior, il est excuse pur terme de sa vie de faire homage a aucun auter heire del seignior. Mes uncore il ferra fealtie al fits et heire le seignior, coment que il fist fealty a son pere.*

ALSO, it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son, and dies, and the seigniorie descendeth to the sonne; in this case the tenant, which did homage to the father, shall not doe homage to the sonne; because that when a tenant hath once done homage to his lord, he is excused for terme of his life to doe homage to any other heire of the lord. But yet he shall do fealtie to the sonne and heire of the lord, although he did fealtie to his father.

“ *NE ferra homage al fitz.*” If *A.* holdeth of *B.* as of the manor of *Dale*, whereof *B.* is seised in taile; *B.* discontinueth the estate taile, and taketh backe an estate in fee simple; *A.* doth homage

mage to *B.* *B.* dieth seised, the issue in taile entreth; *A.* shall doe homage againe to the heire in taile of *B.* because he is remitted to the estate taile; and the state in fee that his father had, in respect whereof the homage is done, is vanished, and the heire in taile is in of a new estate, in respect whereof he ought to doe a new homage. [p] But [p] Britton, 175, 176. regularly it is true, which *Littleton* saith, that when a tenant hath done once homage to his lord, he is excused for terme of his life to make homage to any other heires of the lord. But he shall doe fealty to his sonne, albeit he hath done fealty to the father.

[104. a.]

Sect. 149.

ITEM, si le seignior, apres le homage a luy fait per son tenant, grant le service de son tenant per le fait a un autre en fee, et le tenant attorna, &c. dunque le tenant ne ferra my compel de faire homage. Mes il ferra fealty, coment que il fist fealtye devant a le grauntor; car fealtye est incident a chescun attournement del tenant, quant le seigniorie est graunt. Mes si ascun home soit seisie d'un mannor, et un autre home tient de luy la terre, come del mannor avantdit per homage, lequel tenant ad fait homage a son seignior que est seisie del mannor, si apres un estrange port præcipe quòd reddat envers le seignior del mannor, et recovers le mannor envers luy, et fust execution; en cest case le tenant ferra autrefois homage a celui, que recovers le manor, coment que il fist homage devant; pur ceo que l'estate celui, qu'il recevoit le primer homage, est defeate per le recovery, et ne girra en le bouche le tenant a fauser ou defeater le recoverie, que fuit envers son seignior. Et sic vide diversitatem in ceo case, lou home vient a le seigniorie per recoverie, et lou il vient per discent ou per graunt al seigniorie.

ALSO, if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant attorneth, &c. the tenant shall not be compelled to doe homage. But he shall doe fealty, altho' he did fealty before to the grantor; for fealty is incident to every attournement of the tenant, when the seigniorie is granted. But if any man be seised of a mannor, and another holds of him the land, as of the mannor aforesaid by homage, which tenant hath done homage to his lord who is seised of the mannor, if afterwards a stranger bringeth a præcipe quòd reddat against the lord of the mannor, and recovereth the mannor against him, and sues execution; in this case the tenant shal againe doe homage to him, which recovered the mannor, although he had done homage before; because the estate of him, which received the first homage, is defeated by the recovery, and it shall not lye in the power of the tenant to falsifie or defeat the recovery which was against his lord. And so see a diversitie in this case, where a man commeth to a seigniorie by recovery, and where he commeth to the same by discent or grant.

“ITEM, si le seignior, &c. grant le service de son tenant per fait, &c.” Note a diversitie, when the lord alieneth the seigniorie, and when the tenant alieneth the tenancy; for when the tenant hath done homage, and the seigniorie is transferred to another, either by Britton 176. 13. E. 1. tit. Per quæ servitia 22. & tit. Gar. 91. the (8. Co. 102.)

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the act of the party as alienation, or by act in law as descent, yet the tenant shall not iterate homage, as he shall do fealty, but when the tenant doth homage, and alieneth the tenancy, there is a new tenant, which never did homage, and therefore he ought to doe homage to the lord, albeit his alienor had done it before. And it is to be observed, that none shall doe [*] homage, but the tenant of the land to the lords of whom it is holden; and therefore if homage be due to be done by the tenant, if the tenant alieneth the land to another, the alienor cannot be compelled to doe homage.

[*] 8. E. 4. 27. b.

“ *Attorne, &c.*” Here by (*&c.*) is to be understood, that albeit he pay his rent, performe his annual services, and doe fealtie, which [104. b.] is a part of homage, yet homage he shall not doe.

“ *Mes si ascun home soit seifie d’un mannor, &c.*” Here it appeareth, that the case of the recovery of the feignorie differeth from the alienation of the lord, which is his owne act, or the descent of the feignory to the heire, which is an act in law. And the reason of this diversitie is, for that by the recovery the state of him that received the homage is defeated; for it shall not lie in the mouth of the tenant to falsifie, or to frustrate or defeat the recovery, which was against his lord of the mannor or feignory, for that the tenant had nothing therein, and every man by law ought to meddle in such cases with that which belonged unto him, which is worthy of observation concerning falsifying of recoveries.

Vid. Sect. 551.

33. E. 3.

Avowrie 255.

37. H. 6. 33.

39. H. 6. 34.

7. H. 7. 11.

Doct. & Stud.

fol. 45.

28. H. 8. Dyer

41.

Note, that to falsifie, in legall understanding, is to prove false, that is, to avoyd, or, as *Littleton* here saith, to defeat, in *Latine falsare, seu falsificare, [i] falsum facere.*

[i] 7. H. 8.

cap. 4.

But since *Littleton* wrote, it is recited by act of parliament, that whereas divers, &c. have suffered recoveries against them of divers mannors, &c. for the performance of their wills, for the suretie of their wives joyntures, &c. and the recoverors had no remedy to compell the freeholders and tenants, &c. to attourne unto them, nor could by order of law attaine to the rents, services, &c. that act doth give the recoverors power to distreyne and avow; whereupon many have thought, that this doth impugne *Littleton’s* case of the recovery. But *distinguendum est.* *Littleton* intendeth his case, either upon a recovery by title, (for he saith, that the state of the tenant in the recovery is defeated) or without any consent upon pretence of title, which is all one; for the tenant cannot falsifie, and the lord should avow as one that came in of a former title. And *Littleton* hath good authority in law to warrant [a] his opinion, and the statute of 7. H. 8. extendeth to common recoveries had by consent and agreement, as appeareth by the act itselfe, which then was, and yet is a common assurance and conveyance, whereof the law taketh notice, and whereupon (as appeareth by the act) an use might be limited. So as it is apparent, that such recoverors came in meerely under the state of the lord, &c. and had no remedy (as the statute saith) to compell the freeholders and tenants to attourne, and without attournement could neither distreyne nor avow. Wherefore this statute gave recoverors remedy to distreyne, and a forme to avow and justifie, which they had not before, as it appeareth by the *Doctor and Student*, who lived at that time. The bodie of the act is, *That such recoverors may distreyne and make avowrie, &c. as those persons,*
against

[a] 39. H. 6. 22.

37. H. 6. 38.

35. H. 6. 22.

against whom the said recovery is, should have done, &c. if the same recovery had not been had, and have like remedie, &c.

If a man had made a lease for yeares to begin at Michaelmas, reserving a rent, and before Michaelmas he had suffered a common recovery, the recoveror should distreyn for that rent, which the lessor before the recovery could not. But if the recovery had not been had, then he might have distreyned, and so it is within the statute. But if a fine had been levied of a manor, and before attournment the conusee had suffered a common recovery, the recoveror should not distreyn, &c. because the conusee, against whom the recovery was had, could not. 28. H. 8. Dyer 41.
(Post. 215. 2.
321. a.)

But this act extended onely to distresses and avowries for rents, services, and customes, and gave also a forme of a *quare impedit*. But upon this statute it was holden, that the recoveror could not have an action of debt against the lessee for yeares, nor an action of waste against tenant for life or yeares; and therefore remedy was provided in these cases, by the statute of 21. H. 8. 21. H. 8. cap. 15.

Sect. 150.

ITEM, si un tenant, que doit per son tenure faire a son seignior homage, vient a son seignior, et dit a luy, sir, jeo doy a vous faire homage pur les tenements que jeo teigne de vous, et jeo sue icy prist a vous faire homage pur mesmes les tenements; pur que jeo vous pry, que ore ceo voiles recevoir de moy.

ALSO, if a tenant, which ought by his tenure to doe his lord homage, cometh to his lord, and saith unto him, Sir, I ought to doe homage unto you for the tenements which I hold of you, and I am here ready to doe homage to you for the same tenements; and therefore I pray you, that you would now receive the same from me.

[105. a.] “**VIENT** a son seignior.” The tenant ought to seeke the lord to doe him homage, if the lord be within England; for this service is personall as well of the lord’s side as of the tenant’s side, for law requireth order and decency. And therefore Bracton saith, *et sciendum, quod ille, qui homagium suum facere debet, obtentu reverentie quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commodè adiri, et non tenetur dominus quærere suum tenentem, et sic debet homagium ei facere.* And the same law it is for fealty; and the diversity between these services and the rent is, because that these are personall, and the rent may be payd and received by other, and therefore a tender of the rent upon the land is sufficient.

Bracton, fol. 80. a. And Britton, fol. 171. agreeth herewith.

Lib. 2. Cap. 7. Of Homage Auncestrel. Sect. 151, 152.

Sect. 151.

ET si le seignior adonques refusa de ceo receiver, donque apres tiel refusall le seignior ne poet distreiner le tenant pur le homage aderere, devant que le seignior requiroit le tenant de faire a luy homage, et le tenant a ceo faire refusa.

AND if the lord shall then refuse to receive this, then after such refusall the lord cannot distreine the tenant for the homage behinde, before the lord requireth the tenant to doe homage unto him, and the tenant refuse to doe it.

Vide Bracton, fol. 83.

Britton 171, 172.

21. E. 3. 24.

21. Aff. p. 73.

20. E. 3. Avowry 223.

45. E. 3. 9.

7. E. 4. 4.

21. E. 4. 17. 20. H. 6. 31. (9. Co. 79.)

AND the reason hereof is, for that when the tenant hath done his endeavour and duty to offer his corporall service, and the lord refuseth the same, or doe not accept his service upon his tender thereof, (which is a refusall in law) then the law, in respect of the lord's fault, requireth, that before the lord can distreine for it, that he doth require the tenant to doe that service; and if he either refuse to doe it, or doe it not when he is required, it is a refusall in law.

Sect. 152.

ITEM, home poit tener sa terre per homage auncestrel, et per escuage, ou per auter service de chivaler, auxi bien sicome il poyt tener sa terre per homage auncestrel en socage.

ALSO, a man may hold his land by homage auncestrel, and by escuage, or by other knights service, as well as he may hold his land by homage auncestrel in socage.

SO as homage auncestrel may belong as wel to a tenure by escuage or knights service, as to a tenure in socage, or to a tenure in nature of socage; whereof there hath somewhat been spoken in the Chapter of Socage (1).

(1) [See Note 110.]

TENURE per grand serjeantie est, lou un home tient ses terres ou tenements de nostre seignior le roy per tiels services que il doit en son proper person faire al roy; come de porter le banner de nostre seignior le roy, ou sa lance, ou de amesner son hoste, ou d'estre son marshal, ou de porter son espee devant luy a son coronement, ou d'estre son sewer a son coronement, ou son carver, ou son butler, ou d'estre un de ses chamberlains de le resceit de son eschequer, ou de faire auters tiels services, &c. Et la cause que tiel service est appell grand serjeanty est, pur ceo que il est pluis grand et pluis digne service, que est le service en le tenure d'escuage. Car celui, que tyent per escuage, n'est pas limite per sa tenure de faire ascun pluis especial service que ascun auter, que tyent per escuage, doit faire. Mes celui, que tient per grand serjeanty, doit faire un especial service al roy, que il, que tient per escuage, ne doit faire.

TENURE by grand serjeanty is, where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshall, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause why this service is called grand serjeanty is; for that it is a greater and more worthy service, than the service in the tenure of escuage. For he, which holdeth by escuage, is not limited by his tenure to do any more especial service then any other, which holdeth by escuage, ought to doe. But he, which holdeth by grand serjeanty, ought to doe some speciall service to the king, which he, that holds by escuage, ought not to doe.

TENURE per grand serjeanty." Serjeanty commeth of the French word (*serjeant*) i. *satelles*, and [a] *serjeantia idem est quod servitium*. And it is called [b] *magna serjeantia*, or *serjanteria**, or *magnum servitium*, great service, as well in respect of the excellency and greatnesse of the person to whom it is to be done (for it is to be done to the king only) as of the honour of the service it selfe; and so *Littleton* himselfe in this Section saith, that it is called *magna serjeantia*, or *magnum servitium*, because it is greater and more worthy than knights service, for this is *revera servitium regale*, and not *militare* onely. *Fleta* saith, *magna autem serjeantia dici poterit, cum quis ad eundem cum rege in exercitu, cum equo cooperto, vel hujusmodi, ad patrie tuitionem fuerit feoffatus*.

"De nostre seignior le roy." This tenure hath seven speciall properties. 1. To be holden of the king only. 2. It must be done, when the tenant is able, in proper person. 3. This service is certaine and particular. 4. The reliefe due in respect of this tenure differeth from knights service. 5. It is to be done within the realme (1).

6. It

[a] Glanv. lib. 9. ca. 4.

[b] Bracton, lib. 2. 35. & 84, 85. lib. 1. cap. 10.

* Fleta, lib. 1. cap. 10. lib. 2. cap. 9. in fine.

[c] Britton, cap. 66. fol. 164, 165. Ockam cap.

quod non absoluitur.

45. E. 3. 25. per Finchden. Fleta, ubi supra.

Bracton, lib. 2. 84. 11. H. 4. 34. 10. H. 4.

Avowry 267.

F. N. B. 83.

10. H. 6. Ant.

Demefne 11.

(1) [See Note 11.]

6. It is subject to neither *aid pur faire fitz chivaler*, or *file marier*. And 7. it payeth no escuage.

23. H. 3. tit. Gard. stat. de Ward. et Relev. 28. E. 1.

“Come de porter le banner de nostre seignior le roy, ou de amesner son host.” This great service to the king may (as it appeareth hereby) concerne the warres and matters military; for some grand serjeanties are to be done in the time of war for the safety of the realme; and some in time of peace, for the honour of the realme.

[106. a.]

(4. Inst. 123.)
[*] Fleta, lib. 1. cap. 10.
11. Eliz. Dier. 285. Camd. Brit. 286, 287.
[*] Ockam. cap. Officium Constabularii.

[z] In Rot. Patent. de anno 20. R. 2.

“Ou d’estre son marshall.” [*] If the king giveth lands to a man, to hold of him to be his marshall of his host, or to be marshall of England, or to be constable of England, or to be high steward of England [*], chamberlayne of England, and the like, these are grand serjanties; and these and such like grand serjanties are of great and high jurisdiction, and some of them concerne matters military in time of war, and some services of honour in time of peace. And this is to be observed, that though there were divers lords marshalls of England before the reign of [z] R. 2. yet king R. 2. created Thomas Mowbrey duke of Norfolk the first earle marshall of England per nomen comitis marischalli Angliæ.

“Ou de porter son espee, &c. ou d’estre son sewer a son coronement, &c.” These and such like grand serjanties at the king’s coronation are services of honour in time of peace.

(4. Inst. 106.)
[a] Vid. 51. H. 3. statut. 5.
10. E. 3. c. 11.
14. E. 3. c. 14.
26. H. 8. ca. 2.
34. & 5. H. 8. c. 16.
11. E. 4. fo. 1.
Pl. Com. 207, 208.
[b] Ockam, cap. Quid sit Scaccarium. Gervasius Tilburienfis in Libro Nigro sub custodiâ camerariorum.

“D’estre un de ses chamberlaines, &c. ou de faire auters tiels services.” It is also a tenure by grand serjanty to hold [a] by any office to be done in person concerning the receipt of the king’s treasure; *Quia thesaurus regis respicit regem et regnum*; and *census regius est anima reip.* So it is *firmamentum belli, et ornamentum pacis*.

Milites camerarii dicuntur, quia pro camerariis ministrant; and concerning their office, this is the effect, as Ockam [b] saith, *officium camerariorum in recepta consistit in tribus, scilicet, claves arcarum, &c. bajulant, pecuniam numeratam ponderant, et per centenas libras in formulas mittunt*. But discontinuance in effect hath worne out their office. And yet they continue their name, and keepe the keyes of the treasure where the records doe lye.

Rot. claus. 6. E. 1. memb. 1.

And another saith, *camerarius dicitur à camera, quia camera est locus in quem thesaurus recolligitur, vel conclave in quo pecunia reservatur*. So as *camerarius* in legall signification est *custos regii census*: and *Willielmus de Bellocampo comes Warwici* held *officium camerarii in scaccario*.

Ex lecturâ Marrowe.

Or by any office concerning the administration of justice, *quia justitiâ firmatur solium*.

[c] Ex inquisitione post mortem Variani de Sancto Petro, 4. E. 2. Cest. Vid. 7. Ass. 12. 7. E. 3. 57.

It appeareth by an ancient record, [c] that *Varianus de Sancto Petro tenuit de domino rege in capite medietatem serjantiæ pacis per servitium inveniendi de rege servientes pacis ad custodiendam pacem in Cestriâ*.

See Ockam of the first institution and ancient order of the exchequer, Dier. 4. Eliz. 213. the usherie of the exchequer holden by grand serjanty.

“*This person, &c.*” Here by (&c.) is to be understood other like persons not expressed, as nearly appeareth by that which hath bene said, viz. to be baron of England, constable of England, chamberlayne

chamberlayne of England, and other honourable services, whereof more shall be said in this Chapter.

“ *Ou un especial service al roy.*” That is to say, that this great service be specially set downe; for it may consist of divers branches, as to goe with the king in his warre in the foreward, and to returne in the reareward; and also to pay rent, &c. but yet it must be certaine and particular.

23. H. 3. Gard.
148.

Sect. 154.

106. b.] *ITEM, si tenant que tient per escuage morust, son heire esteant de pleine age, s'il tenoit per un fee de chivaler, le heire ne paiera forsque c. s. pur reliefe, come est ordaine per le statute de Magna Charta, cap. 2. Mes si celuy que tient de roy per grand serjeantie morust, son heire esteant de plein age, le heire paiera al roy pur reliefe le value de les terres ou tenements per an (ouster les charges et reprises) queux il tient del roy per grand serjeantie (1). Et est ascavoir, que serjeantia en Latin idem est quod servitium, et sic magna serjeantia idem est quod magnum servitium.*

ALSO, if a tenant which holds by (Ante 83. a.) escuage dyeth, his heire being of full age, if he holdeth by one knight's fee, the heire shall pay but a c. s. for reliefe, as is ordained by the statute of Magna Charta, c. 2. But if he which holdeth of the king by grand serjeanty, dieth, his heire being of full age, the heire shall pay to the king for reliefe one yeares value of the lands or tenements which he holdeth of the king by grand serjeantie over and besides all charges and reprises. And it is to be understood, that *serjeantia* in Latine is the same *quod servitium*, and so *magna serjeantia* is the same *quod magnum servitium*.

“ *Paiera al roy pur reliefe de value de ses terres, &c.*” And here- 11. H. 4. 72. b. with agreeth 11. H. 4. 72. b.

“ *Serjeantia idem est quod servitium.*” Hereby it appeareth that the explanation of ancient words and the true sense of them are requisite, and to be understood *per verba notiora*.

Sect. 155.

ITEM, ceux, que teignent per escuage, doivent faire leur service hors de roialme; mes ceux, que teignent per ground serjeantie, pur le greinder part doivent faire leur services deins le roialme.

ALSO, they, which hold by escuage, ought to doe their service out of the realme; but they, which hold by grand serjeantie, for the most part ought to do their services within the realme.

(1) See as to reliefs ante 69. b. 76. a. 83. a.

“**T**ENANTS *per escuage* doivent faire leur service hors del roialme.”

F. N. B. 83. E.
(4. Co. 88.)

For he, that holdeth by cornage or castle-gard, holdeth by knights service, and is to doe his service within the realme; but he holdeth not by escuage; and therefore *Littleton* materially said tenant *per escuage*, and not tenant by knights service (2).

“*Pur le greinder parti.*” For to bear the king’s banner, or his lance, or to lead his host, and to be his marshall, &c. may be as well without the realme; and therefore *Littleton* said (for the greatest part).

Sect. 156.

ITEM, *il est dit, que en les marches de Scotland ascuns teignent de roy per cornage, c’estascavoir, pur ventier un cornu, pur garner homes de pais, quant ils oyent que le Scottes ou auters enemies veignent ou voilent enter en Engleterre; quel service est grand serjeanty. Mes si ascun tenant tient d’ascun auter seignior, que de roy, per tiel service de cornage, ceo n’est pas grand serjeantie, mes est service de chivaler, et trait a luy garde et mariage; car nul poit tener per grand serjeanty si non de roy tantsolement.*

ALSO, it is said, that in the marches of Scotland some hold of the king by cornage, that is to say, to winde a horne, to give men of the countrie warning, when they heare that the Scots or other enemies are come or will enter into England; which service is grand serjeanty. But if any tenant hold of any other lord, then of the king, by such service of cornage, this is not grand serjeanty, but it is knights service, and it draweth to it ward and marriage (2); for none may hold by grand serjeanty but of the king only,

4. H. 5. cap. 7.
22. E. 4. cap. 8.
Camden in Britannia.

“**E**N les marches de Scotland.” *Marches* is either a Saxon word, and signifieth *limites*, *bourdours*, or an English word, viz. *Markes*. *Nota*, for that it lyeth neere to Scotland, it is sayd in the marches of Scotland, and yet the land whereof *Littleton* here speaketh, lieth in England (1). [107. a.]

“*Per cornage.*” *Cornagium* is derived (as *cornuare* also is) à *cornu*, and is as much (as before hath been noted (3)) as the service of the horne. It is also called in old bookes *borngeld*.

23. H. 3. tit.
Gard. 148.
8. E. 3. 66.
in fine. 16. E. 3.
Avoirie 90.
F. N. B. 83.

Note, a tenure by cornage of a common person is knights service, of the king it is grand serjeanty; so as the royall dignity of the person of the lord maketh the difference of the tenure in this case (4). And I find that there were *cornicularii* amongst the Romans; *et dicti fuerunt cornicularii quia cornu faciebant excubias militares*; and *magna serjeantia* is appropriated only to this tenure.

(2) [See Note 112.]

(2) [See Note 113.]

(3) See ante 69. b.

(4) See post. 108. b. where for a like reason a service, which if it was to be done to a subject would be *foage*, is distinguished by the denomination of *petit serjeanty*.

[107. a.]

(1) See further as to the *marches* of Scotland, 4. Inst. 281. and Nicholf. *Leges March.*

Sect. 157.

ITEM, home poit veier anno 11.

H. 4. que Cokayne, adonque chiefe baron d'eschequer, vient en le common banke, portant ovesques luy la copie d'un recorde in hæc verba. Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. Et il demaunda, s'il fuit graund serjeanty, ou petite serjeantie. Et Hanke adonques disoit, que il fuit graunde serjeantie; pur ceo que il ad service a faire per corps d'un home, et s'il ne purra trover nul home a faire le service pur luy, il mesme doit faire. Quod alii justitarii concesserunt. Cokaine dunque, Doit le tenant en ceo cas paier reliefe al value de terre per an? Ad quod non fuit responsum.

ALSO, a man may see in anno

11. H. 4. that Cokayne, then chiefe baron of the exchequer, came into the common place, and brought with him the copy of a record in these words. *Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c.* And he demanded, if this were grand serjeanty, or petite serjanty. And Hanke then said, that it was grand serjanty; because he had a service to do by the bodie of a man, and if he cannot find a man to doe the service for him, he himselfe ought to doe it (5). *Quod alii justitarii concesserunt.* Then saith Cokaine, Ought the tenant in this case to pay reliefe to the value of the land by the yeare? *Ad quod non fuit responsum.*

“**E**T s'il ne purra trover nul home a faire le service pur luy, &c.”

Hereby it appeares, that tenant by grand serjeantie may in some cases make a deputy; and therefore the diversitie is, that where the grand serjanty is to be done to the royall person of the king, or to execute one of those high and great offices, there his tenant cannot make a deputie without the king's licence; and therefore Littleton hath said before that such services are to be done in proper person. But he that holdeth to serve him in his warre within the realme or by cornage, may make a deputie.

[*] *Johannes de Archier qui tenet de domino rege in capite per serjeantiam archerie, &c. in comitatu Glouc. hæres in custodia.*

11. H. 4. 72.
24. E. 3. 32.
Vide Hill. 8. E. 1.
Middl. inter Placita de Banco,
Sir John Moyses's case.

11. H. 4. 72.

[*] Claus. 18.
H. 3. m. 5.

“*Infra quatuor maria.*” That is, within the kingdome of England, and the dominions of the same kingdome (6).

Now it is good to be seene what persons that hold by grand serjantie may doe and performe that honourable service in person, and who ought not to be received therunto, but ought to make a sufficient deputy. At the coronation of [a] king R. 2. *John Wilsbire* citizen of London exhibited his petition to the high steward of England in his court, that where the said *John* held certain lands in *Hayden* in the county of *Essex* of the king by grand serjeantie, viz. to hold a towell when the king should wash his hands before dinner the day of his coronation, &c. and prayed that he might be accepted to doe this office of grand serjantie, the judgement followeth. *Et*

Rot. Eschaetor.
41. H. 3. nu. 23.
Stephen Haringdon's case.

[a] 1. R. 2. Rot.
Claus. m. 45.

quia

(5) [See Note 114.]

(6) [See Note 115.]

quia apparet per record' de Scaccario domini regis in curiâ monstrat' quod prædicta tenementa tenentur de domino rege per servitium prædictum, ideo dictus Johannes admittitur ad servitium suum hujusmodi faciendum per Edmondum comitem Cantabrigiæ deputatum suum, et sic idem comes in jure ipsius Johannis manutergium tenuit, quando dominus rex lavabat manus suas dicto die coronationis suæ ante prandium.

By which record it appeareth, that the said *John Wilsbire*, being of his quality and having not any dignity, could not doe and performe this high and honorable service to the royall person of the king, but did make an honorable deputy, who performed it in his right; which is worthy of observation.

Vid. 1. R. 2.
memb. 45.

At the same coronation *William Furne-vall* exhibited his petition in the same court, that where he held the mannor of *Farnham*, in the county of *Buck*, with the hamlet of *Cere* in the same county, by the service to find to the king at his coronation a glove for his right hand, and to support the king's right hand the same day, while he held in his hand the verge royall, the judgement followeth. *Quâ quidem petitione debitè intellectâ, et factâ publicâ proclamatione, si quis clameo ipsius Willielmi in eâ parte contradicere vellet, nemineque ei contrariante, consideratum fuit, quod idem Willielmus, assumpto per eum primitus ordine militari, ad servitium prædictum admitteretur faciendum; et postmodo (videlicet) die Martis proximo ante coronationem prædictam dominus rex ipsum Willielmum apud Kenington honorificè præfecit in militem, et sic idem Willielmus servitium suum prædictum dicto die coronationis, juxta considerationem prædictam, perfecit et in omnibus adimplevit.* By which it appeareth, that a knight is of that dignity, that he may performe this high and honourable service in his owne person; and although this *William Furne-vall* was descended of an honorable family, yet before he was created knight he could not performe it.

And sir *John de Argentine*, chivalier, performed the service of grand serjanty, to be the king's cup-bearer at the same coronation.

[m] Vid. 1. R. 2.
m. 45.

[m] *Anne*, which was the wife of sir *John Hastings* earle of *Pembroke*, who held the mannor of *Ashley* in *Norfolke* of the king by grand serjantie, viz. to performe the office of the napery at his coronation, was adjudged to make a deputy, because a woman cannot doe it in person; and thereupon she deputed sir *Thomas Blount*, knight, who performed the same in her right. *John*, sonne and heire of *John Hastings* earle of *Pembroke*, exhibited in the same court his petition, shewing that by his tenure he was to carrie the great spurres of gold before the king at his coronation, &c. The judgement is, *Auditâ et intellectâ billâ prædictâ, pro eò quod dictus Johannes est infra aetatem et in custodiâ domini regis, quanquam sufficienter ostenditur per recorda, et evidencias, quod ipse servitium prædictum facere deberet, consideratum extitit, quod esset ad voluntatem regis, quis dictum servitium ipsâ vice in jure ipsius Johannis faceret; et super hoc dominus rex assignavit Edmondum comitem Marchiæ ad deferendum dicto die coronationis prædicta calcariâ in jure præfati hæredis, salvo jure alterius cujuscunque. Et sic idem comes Marchiæ calcariâ illâ prædicto die coronationis coram ipso domino rege deferabat.* By which it appeareth, that the heire, before he hath accomplished his age of one and twenty yeares, cannot performe his great and honourable service, but during the minority the king shall appoint one to performe the service.

Vid. 1. R. 2.
m. 45.

Sect. 158.

ET nota, que tous que teignent de roy per grand serjeanty, teignent de roy per service de chivalrie; et le roy pur ceo avera garde, mariage, et reliefe; mes le roy n'avera de eux escuage, s'ils ne teignent de luy per escuage.

AND note, that all which hold of the king by grand serjanty, hold of the king by knights service; and the king for this shall have ward, marriage, and reliefe; but he shall not have of them escuage, unlesse they hold of him by escuage.

[108. a.] HERE *Littleton* saith, that he, that holds by grand serjeantie, doth hold by knights service, which is so said of the effects. 46. E. 3. 15. a. per Finchden.
 And therefore *Littleton* doth add, that the king shall have ward marriage and reliefe, which are the effects of knights service, &c.
 Sometimes in ancient records, *servitium militare* is called *servitium hauberticum*, or *servitium brigandinum*, or *servitium loricatedum*. (Ante 75. a.) And a *haubert* or *brigandine* signifieth a coat of maille (1).

(1) [See Note 116.]

CHAP. 9.

Petit Serjeantie.

Sect. 159.

TENURE *per petit serjeanty est,*
lou home tient sa terre de nostre
seignior le roy, de render al roy annual-
ment un arke, ou un espee, ou un dag-
ger, ou un cuttel, ou un launce, ou un
paire de gants de ferre, ou un paire de
spoures d'ore, ou un sete, ou divers setes,
ou de render autres tiels petit choses
touchants le guerre.

TENURE by petite serjeanty is,
 where a man holds his land of our
 soveraigne lord the king, to yeeld to
 him yearly a bow, or a sword, or a
 dagger, or a knife, or a lance, or a
 paire of gloves of maile, or a paire of
 gilt spurs, or an arrow, or divers ar-
 rowes, or to yeeld such other small
 things belonging to warre.

Britton, fol. 164.
 Bracton, lib. 2.
 fol. 35. Fleta,
 lib. 2. cap. 9.
 Ockam, cap.
 Quid de avibus
 oblati.
 (6. Co. 6.)

DE nostre seignior le roy." And so Littleton concludeth this
 Chapter, that a man cannot hold by grand serjeanty or pe-
 tite serjeanty but of the king, and of the king as of his person, and
 not of any honour or manor (2). And it is to be observed, that re-
 gularly a tenure of the king as of his person is a tenure *in capite*, so
 called κατ' ἐξουνη, *propter excellentiam*; because the head is the principall
 part of the body, and he that holdeth of any common person as of
 his person, he in truth holdeth *in capite*; but againe κατ' ἐξουνη it is
 only in common understanding applyed to the king, and that seig-
 niory of a common person is called a tenure in grosse, that is, by it-
 selfe, and not linked or tied to any mannor, &c.

[a] Bracton, lib.
 2. fol. 87.
 (2. Ro. Abr.
 504.)
 [b] 3. E. 3.
 Tenures B. 94.
 30. H. 8. 43.
 28. H. 8.
 Livery B. 57.
 29. H. 8. ibid.
 58. 6. H. 8.
 Dier 58. Vide
 Lestatute de
 i. E. 6. cap. 4.
 F. N. B. 5. K.
 (2. Ro. Abr. 72,
 73.)

And this tenure of the king *in capite*, is said [a] to be a tenure of
 the king as of his crowne, that is, as he is king. [b] And therefore
 if one holdeth land of a common person in grosse as of his person,
 and not of any mannor, &c. and this seigniory escheateth to the king
 (yea though it be by attainder of treason) he holdeth of the person
 of the king, and not *in capite*; because the originall tenure was not
 created by the king. And therefore it is directly said, that a tenure
 of the king *in capite*, is when the land is not holden of the king as
 of any honor, castle, or mannor, &c. but when the land is holden
 of the king as of his crowne (3).

Note, that an honor is the most noble seigniory of all others, and
 originally created by the king, but may afterward be granted to
 others. See for the creation of an honor, 13. H. 8. cap. 5.
 33. H. 8. cap. 37, 38. 37. H. 8. cap. 18. (4).

And it is to be observed, that a man may hold of the king *in ca-*
pite, or of his crowne, as well in socage, as by knight's service (5).

Magna Chart.
 cap. 27.

"De render al roy annualment un arke, ou un espee, &c." As
 grand serjeanty must be done by the body of a man, so petite ser-
 jeanty hath nothing to do with the body of a man, but to render
 some things touching warre; as a bow, a sword, a dagger, a knife,
 a lance, a pair of gantlets of iron, or shafts, and such like.

Regist. fo. 2.
 F. N. B. fo. 1.

It is to be observed, that grand serjeanty or knights service is not
 in law called *liberum servitium*, as socage is, but *per feodum unius mi-*
litis, &c. But to finde the king so many ships for his passage is
 called

[108. b.]

(2) [See Note 117.]
 (3) [See Note 118.]

(4) [See Note 119.]
 (5) [See Note 120.]

called *liberum servitium*; and therefore it is said, *per liberum servitium, ad inveniendum nobis quinque naves ad transitum nostrum ad mandatum nostrum*. And therefore cleerly such a tenure is neither grand serjeanty, nor knights service; because nothing is to be done by the body of any man, nor in that case touching war, but ships to be found. And this is the reason that *Littleton* yeeldeth of the examples he doth here put, because that such a tenant by his tenure ought not to go, nor to doe any thing in his person, touching war. And herewith agreeth *Bracton*, *ex parvis serjeantiis, quæ non respiciunt regem nec patriæ defensionem, nullum competere debet maritagium nec custodiam, &c.*

Bract. li. 2.
fo. 35.

If a man holdeth land of the king, to finde an horse of such a price and a saddle and a bridle by forty dayes, or any other time, when the king goeth with his army against *Wales*, this is petite serjeanty, and no grand serjeanty, for the cause aforesaid,

9. H. 3. Gard.
145.

Sect. 160.

ET tiel service ne est forsque focage en effect; pur ceo que tiel tenant per son tenure ne doit aler, ne fayre ascun chose, en son proper person, touchant le guerre, mes de render et payer annualment certaine choses al roy, sicome home doyt payer un rent.

AND such service is but focage in effect; because that such tenant by his tenure ought not to goe, nor do any thing, in his proper person, touching the warre, but to render and pay yearly certaine things to the king, as a man ought to pay a rent.

“*T*IEL service n'est forsque focage, &c.” But, as it hath beene said, the dignity of the person of the king giveth the name of petite serjeanty, which in case of a common person should be called plain focage, *ab effectu*; for it shall have such effects or incidents as belong to focage, and neither ward nor marriage, &c. for they belong to knights service.

9. H. 3. Gard.
145.

Of this tenure the Great Charter in the person of the king saith thus: *Nos non habebimus custodiam hæredis, &c. occasione alicujus parve serjeantie, quam tenet de nobis per servitium reddendo nobis cultellos, sagittas, &c.*

Mag. Chart.
ca. 28.
Vide Stat. de
Wardis & Reli-
viis 28. E. 1.

Sect. 161.

*E*T nota, que home ne poyt tener per graund serjeantie, ne per petit serjeanty, sinon de roy, &c.

AND note, that a man cannot hold by grand serjeanty, nor by petite serjeanty, but of the king, &c.

OF this sufficient hath beene sayd before, saving that *parva serjeantia* is only appropriate to this tenure (1).

Vide Sect. 1.

(1) [See Note 121.]

TENURE en burgage est, lou an-
tient burgh est, de que le roy est
seignior, et ceux, que ont tenements deins
le burgh, teignent del roy leur tenements;
que chescun tenant per son tenement doit
payer al roy un certain rent per an, &c.
Et tiel tenure n'est forsque tenure en so-
cage.

TENURE in burgage is, where
an ancient burrough is, of which
the king is lord, and they, that have
tenements within the burrough, hold
of the king their tenements; that
every tenant for his tenement ought
to pay to the king a certaine rent by
yeare, &c. And such tenure is but
tenure in socage.

Bracton, lib. 3. "BURGAGE," in Latine *burgagium*, is derived of this word
Tract. 2. *burgus*, which is *vicus*, *pagus*, or *villa*, a towne (2); and
Britton, fol. 164. it is called a burgh (3), because it sendeth burgeses to parlia-
Mirror, cap. 2. ment (4).
sect 18.
10. Co. 123, 124. the Mayor of Lynn's Case. 40. Aff. p. 27. 43. E. 3. 32. 21. E. 4. 53. & 54.
21. H. 7. 15. 2. E. 3. cap. 3.

Of burghs some be incorporate, and some not; and some be
walled, and some not. [b] It was in former times taken for those com-
panies of ten families, which were one another's pledge; and there-
fore a pledge is in the Saxon tongue *borhoe*, whereof some take it
that a burgh came; whereof also commeth headborough or borow-
head, *capitalis plegius*, a chiefe pledge, viz. the chiefe man of the
borhoe, whom Bracton calleth *frühburgus*; and hereof also commeth
burgbote, which, as Fleta saith, signifieth *quietantiam reparationis*
murorum civitatis aut burgi.

[109. a.]

Every city is a burgh, but every burgh is not a city; whereof
more shall be said hereafter. And the termination of this word
burgagium (as before hath beene noted), signifieth the service
whereby the burgh is holden. And of this word (*burgh*) two an-
cient and noble families take their names, viz. *de Burgo*, and *de*
Burgo caro, Burchier.

F. N. B. 64. d. "De que le roy est seignior." But it may be holden of another,
as by that, which immediately followeth, appeareth.

Sect. 163.

ET mesme le manner est, lou un
auter seignior espiritual ou tempo-
rall est seignior de tiel burgh, et les te-
nants de tenements en tiel burgh teignent
de leur seignior a payer, chescun de eux,
un annual rent.

AND the same manner is, where
another lord spirituall or tempo-
rall is lord of such a burrough, and the
tenants of the tenements in such a
burrough hold of their lord to pay,
each of them yearly, an annual rent.

(2) For the difference between *town* and
borough, see post. 115. b.

(3) For the etymology of *borough*, besides
Spehnan, Du Fresne, and the other glossarists,

see Whitl. on Parliam. 497. Brad. on
Bor. 1. and Mad. Firm. Burg. 2.

(4) [See Note 122.]

THIS is evident, and needeth no explanation. Only this by the way is to be observed, that bishops, being lords of parliament, have not been called lords spirituall so lately as some have imagined.

16. R. 2. ca. 5.
1. H. 4. ca. 2, &c.

Sect. 164.

E*T est appel tenure en burgage, pur ceo que les tenements deins le burgh sont tenus del seignior del burgh per certaine rent, &c. Et est ascavoire, que les antient villes appel burgh, sont les plus ancient vills que sont deins Engleterre; car ceux villes, que ore sont cities ou counties, en antient temps fueront burghes, et appellees burghes; car de tielx ancient villes appellees burghes, veignent les burgeesses al parliament, quant le roy ad summon son parliament (1).*

AND it is called tenure in burgage, for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes called burroughes be the most ancient towns that be within England; for the townes that now be cities or counties, in old time were boroughes, and called boroughes; for of such old townes called boroughes, come the burgeesses of the parliament to the parliament, when the king hath summoned his parliament.

“**P***ER certaine rent, &c.*” By (&c.) here is implied fealtie, or other service, as to repaire the house of the lord, &c.

“*Les ancient villes appel burghes.*”

So as a burgh is an ancient towne, holden of the king or any other lord, which sendeth burgeesses to the parliament.

And it is to be observed, that *Burgh* and *Burie* have all one signification; as *Canterburie*, *Burie Saint Edmond*, *Sudburie*, *Salisburie*, *Banburie*, *Heytesburie*, *Malmesburie*, *Sbafiesburie*, *Teukesbury*, and others send burgeesses to the parliament. *Vide pro villis, parochiis et hamletris, postea, Section. 171.*

“*Cities,*” *Civitas*, whereof commeth the word city. A city is a borough incorporate (2); which hath or have had a bishop; and though the bishopricke be dissolved, yet the city remaineth.

In the time of *William the Conquerour* it is declared in these words: *Item nullum mercatum vel forum sit, nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis clausis et muro vallatis, et castellis, et locis tutissimis, ubi consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ, quæ constitutæ sunt à bonis prædecessoribus nostris, deperire non possunt, nec defraudari, nec violari, sed omnia ritè et per iudicium et iustitiam fieri debent: et ideo castella et burgi et civitates sunt et fundatæ et edificatæ; scilicet ad tuitionem gentium et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate et integritate et ratione.* So as by this it appeareth, that cities were instituted for three purposes. First, *Ad consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ*

Lamb. fol. 125.

(1) See ante 108. b. note 4.

(2) [See Note 123.]

træ conservand'. 2. Ad tuitionem gentium et populorum regni. And thirdly, *Ad defensionem regni.* For conservation of laws, whereby every man enjoyeth his owne in peace; for tuition and defence of the king's subjects; and for keeping the king's peace in time of sudden uprores; and lastly, for defence of the realme against outward or inward hostility.

Mirror, cap. 2.
sect. 18.
Britton, fol. 87.

Civitas et urbs in hoc differunt, quod incolæ dicuntur civitas, urbs verò complectitur ædificia; but with us the one is commonly taken for the other. *Villeins sont coultivers de fiese demurrants in villages upland; car de ville est dit villeine, et de borowghes burgeses, et de cities citizens.*

Mich. 7. R. 1.
Rot. 1. (which
was in Anno
Dom. 1195) in
an Ass. of Dar-
reine Present-
ment for the
Church of St.
Peter's in Cam-
bridge.

Every borough encorporate, that had a bishop within time of memory, is a citie, albeit the bishopricke be dissolved; as *Westminster* had of late a bishop, and therefore it yet remaines a city. (3). The burgh of *Cambridge*, an ancient city, as it appeareth by a judiciall record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men, the recognitors of that assise; which (omitting many others) I thought good to mention, in remembrance of my love and duty *almæ matri academiæ Cantabrigiæ*.

There be within *England* two archbishoprickes, and twenty-three other bishoprickes. Therefore so many cities there be; and *Cambridge* and *Westminster* being added, there are in all twenty-seven cities within this realme, and may be more, than at this time I can call to memory.

It is not necessary that a citie be a county of itselfe; as *Cambridge*, *Ely*, *Westminster*, &c. are cities, but are no counties of themselves, but are part of the counties where they be.

(Post 168. a.)

“*Counties,*” or Shires; the one taken from the *French*, the other from the *Saxon*, in *Latine Comitatus*. Counties are certaine circuits or parts of the kingdome, into the which the whole realme was divided for the better gouvernement thereof, so as there is no land but it is within some county. And every of them is governed by a yearly officer, which we call a Shireve; which name is compounded of these two *Saxon* words *shire* and *reve* [*i. e.*] *præpositus* or *præfectus comitatûs*. But hereof more hereafter in his proper place shall be spoken. There be in *England* forty-one counties, and in *Wales* twelve.

10. Co. 123, 124.
Vid. devant
Sect. 97.

“*Veignent les burgeses al parliament, &c.*” Parliament is the highest and most honourable and absolute court of justice in *England*, consisting of the king, the lords of parliament, and the commons. And againe, the lords are here divided into two sorts, viz. spirituall and temporall. And commons are divided into three parts, viz. into knights of shires or counties, citizens out of cities, and burgeses out of burrowghes; the words of the writ to the sherife for the election being, *duos milites gladiis cinctos magis idoneos et discretos comitatûs tui, et de quâlibet civitate comitatûs tui duos cives, et de quolibet burgo duos burgenses de discretioribus, et magis sufficientibus, &c.* all which have voyces and suffrages in parliament. You shall reade in the parliament rolls, that (as hath beene said) there is *lex et consuetudo parliamenti, quæ quidem lex quærenda est ab omnibus, ignorata à multis, et cognita à paucis*. Of the members of this court some be by descent, as ancient

[110. a.]

Vide Sect. 3.
(4. Inst. 2.)

ancient noblemen; some by creation, as nobles newly created; some by succession, as bishops; some by election, as knights, citizens, and burgeses.

It is called parliament, because every member of that court should sincerely and discreetly *parler la ment* (1) for the general good of the common wealth; which name it hath also in Scotland (2); and this name before the Conquest was used in [a] the time of Edward the Confessor, William the Conquerour, &c. (3). It was anciently before the Conquest called *micel sinoth*, *micel gemote*, *ealsa witenagemote*; that is to say, the great court or meeting of the king and of all the wisemen, sometime of the king with the counsell of his bishops nobles and wisest of his people. This court the Frenchman calleth *les estates*, or *l'assemble des estates*. In Germany it is called a *diet*. For those other courts in France that are called parliaments, they are but ordinary courts of justice; and (as Paulus Jovius affirmeth) were first established by us.

The king of England is armed with divers counsels, one whereof is called *commune concilium*, and that is the court of parliament, and and so it is legally called in writs and judicial proceedings *commune concilium regni Angliæ*. And another is called [b] *magnum concilium*: this is sometime applied to the upper house of parliament, and sometime out of parliament time to the peeres of the realme, lords of parliament, who are called *magnum concilium regis*; for the proove whereof take one [c] record for many in the fift yeare of king H. 4. at what time there was an exchange made betweene the king and the earle of Northumberland, whereby the king promisseth to deliver to the earle lands to the value, &c. *per advice et assent des estates de son realme et de son parliament* (*parenfi que parliament soit devant le feast de St. Lucy*) *ou auterment per advice de son graund counsell, et auters estates de son realme, que le roy ferra assembler devant le dit feast, in case que le parliament ne soit*. And herewith agreeth the act of parliament in 37. E. 3. cap. 18. where it is said, before the chancellor treasurer and great counsell. (4) Thirdly (as every man knoweth), the king hath a privy counsell for matters of state; (as for example) [d] *Henricus de Bellomonte baro de magno et de privato concilio regis juratus*, and many others before and after. The fourth counsell of the king are his judges of the law for law matters; and this appeareth frequently in our [e] bookes; and must be intended, when it is spoken generally by the counsell, it is to be understood *secundum subjectam materiam*; for example, if it be legall, then by the king's counsell of the law, viz. his judges (5).

Now for the antiquity of this high court of parliament, whereof Littleton here speaketh, it appeareth, that divers parliaments have beene holden long before and untill the time of the Conqueror, which be in print, and many more appearing in ancient records and manuscripts (6). [f] *Le roy Alfred assembler les counties, &c. et ordeina pur usage perpetual, que deux foiz per an ou plus sovent pur mistier in temps de peace se assemblerent a Londres, a parlermenter sur le guidement del peuple de Dieu, et coment soy garderont de pecher, viveront en quiet, et recei-veront droit per usage et sanits judgements. Per ceste estate se fieront plusors ordinaances per plusors roys jesque a temps le roy que*

4. H. 8. cap. 8.
[a] Treatif. de
Modo tenend.
Parliam.

21. E. 3. fo. 60. a.
Johannes de Ru-
picella tempore
regis Johannis.
Pol. Virgil. li. 3.
tempore H. 1.
W. 1. 3. E. 1.
in the title.
(Doct. & Stud.
164.

3. Inst. 125. 179.
4. Inst. 53.)

[b] Bracton, lib.
1. cap. 2.
Regist. 280.

[c] 27. Aug.
5. H. 4.

[d] In dorf.
Claus. 16. E. 2.
m. 5.

(7. Co. 36.)

[e] 43. Aff. 15.

27. H. 6. 5.

1. R. 3. 11.

Regist. 191.

122, 123.

4. E. 3. 2.

39. E. 3. 35.

3. Aff. 15.

19. E. 3. Juge-

ment 174. W. 1.

ca. 1. Lestat. de

Templar. 16. R.

2. Stat de Præ-

munire.

See the same

published by Mr.

Lambard.

[f] Mirror, ca.

1. sect. 2. Vjde

Statutes de 4. E.

3. ca. 14. &

36. E. 3. ca. 10.

(1) [See Note 125.]

(4) [See Note 128.]

(2) [See Note 126.]

(5) [See Note 129.]

(3) [See Note 127.]

(6) [See Note 130.]

Lib. 2. Cap. 10. Of Tenure in Burgage. Sect. 165.

ore est, que fuit le roy E. 1. The conclusion of that great parliament holden by king *Ethelstan* at *Grately* is very remarkable, which I have seene in these words. *All this was enacted in that great synod or councell at Grately, whereat was the archbishop Wolsfelme, with all the noblemen and wise men, which king Athelstan called together.*

Mirr. ca. 2. sect.
4. 7. 10. 14. ca.
4. de Defaults, &
cap. de Homi-
cide, cap. 1. sect.
13. cap. 4. de
Poyns. Ockam
quid cum Ven.
Matth. Paris,
212, 213.

There have beene in the time of, and since the Conquest, in the reignes of *H. 1. king Stephen, H. 2. R. 1. king John, H. 3. &c.* 280 sessions of parliament, and at every session divers acts of parliament made, no small number whereof are not in print (7).

[a] Pl. Com.
398. b. Doctor &
Stud. ca. 55.
fol. 164.
[b] Fleta, lib. 2.
ca. 2. Fortescue
de Laudibus
Legum Angliæ.
Braët. lib. 1.
ca. 2.
(Doctor & Stud. 32.)

The jurisdiction of this court is so transcendent, that it maketh, inlargeth, diminisheth, abrogateth, repealeth, and reviveth lawes, statutes, acts, and ordinances, concerning matters ecclesiasticall, capitall, criminall, common, civill, martiall, maritime, and the rest. None can begin, continue, or dissolve the parliament, but by the king's authority. Of which court it is said, [a] *Que il est de tres grand honor et justice, de que nul doit imaginer chose dishonorable.* [b] *Habet rex curiam suam in concilio suo in parliamentis suis, presentibus prelatibus, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ sunt dubitationes judiciorum, et novis injuriis emerfis nova constituuntur remedia, et unicuique justitia prout meruerit retribuetur ibidem.* But this properly doth belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice.

Sect. 165.

[110. b.]

ITEM, *pur le greinder part tielx burghes ont divers customes et usages, que n'ont pas auters villes. Car ascuns burghes ont tiel custome, que si home ad issue plusors fits et morust, le puisne fits enheritera tous les tenements que fueront a son pere deins mesme le burgh, come heire a son pere per force de custome; et tiel custome est appel burgh English.*

ALSO, for the greater part such boroughes have divers customes and usages, which be not had in other towns. For some boroughes have such a custome, that if a man have issue many sonnes and dyeth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heire unto his father by force of the custome; the which is called borough *English* (1).

(Post. 115. b.)
[*] Braët. lib. 1.
ca. 3. fol. 2.

“**C**USTOMES et usages.” *Consuetudo* is one of the maine triangles of the lawes of *England*; those lawes being divided into common law, statute law, and custome. Of which it is said, [*] that *consuetudo quandoque pro lege servatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet; longævi enim temporis usus et consuetudinis non est vilis autoritas.* [c] *Longa possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino.*

[c] Idem, lib. 2.
fol. 52.
(Dav. 33. a.)

Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawfull interruption.

“*Que*

(7) See Pref. to Ruff head's Stat. 21.

[110. b.]

(1) [See Note 131.]

“*Que n'ont pas autres villes.*” It is necessary to be knowne what customes may be alledged in an upland towne, which is neither citie nor borough. [*] In an upland towne, that is neither city nor borough, such a custome to devise lands cannot be alledged. Neither in an upland towne can there be a custome of borough *English* or gavelkinde; but these are customes, which may be in cities or borroughes. [d] Also, if lands be within a mannor fee or feigniorry, the same by the custome of the mannor fee or feigniorry may be devisable, or of the nature of gavelkinde or borough *English*. [*] But an upland towne may alledge a custome to have a way to their church, or to make by-lawes for the reparations of the church, the well ordering of the commons, and such like things. And it is to be observed, that in special cases a custome may be [e] alledged within a hamlet, a towne, a burgh, a city, a mannor, an honor, an hundred, and a county: but a custome cannot be alledged generally within the kingdome of *England*; for that is the common law (2).

“*Le puisne fits inheritera.*” And yet by some customes the youngest brother shall inherit; for *consuetudo loci est observanda* (3).

“*Touts les terres ou tenements:*” Either in fee simple, fee taile, or any other inheritance. If lands of the nature of borough *English* be letten to a man and his heires during the life of *I. S.* and the lessee dyeth, the youngest sonne shall enjoy it (4).

“*Borough English:*” So called, because this custome was first (as some hold) in *England* (5).

(Doct. Plac. 104. 5. Co. 84. a.)

[*] 44. E. 3. 33.
40. Aff. 4. 27. 41.
21. E. 4. 54.
43. E. 3. 32.

[d] 21. E. 4. 53, 54.
(6. Co. 59. b.)

[*] 21. E. 4. 54.
15. E. 4. 29.

11. H. 7. 14.
44. E. 3. 18.

21. H. 7. 40.
[e] Brañt. lib. 4.

271. 34. E. 1.
Detinue 60.

17. E. 2. Detinue.
58. 3. E. 3.

Det. 156.
30. E. 3. 25.

39. E. 3. 6. 9, 10.
31. E. 3. Render

6. 17. E. 3. 27.
21. E. 4. 28.

22. E. 4. 8.
7. E. 3. 51.

30. E. 3. 23.
34. H. 8. Dier

54. F. N. B. 122.
5. E. 3. Tresp. 13.

Vid. Glanvil. lib.
7. ca. 3. 9.

Sect. 166.

ITEM, en ascun burghes, per le custome, feme avera pur sa dower tous les tenements que fueront a sa baron, &c.

ALSO, in some boroughes, by custome, the wife shall have for her dower all the tenements which were her husband's.

AND this is called frank banke, *francus bancus*. *Consuetudo est in partibus illis, quod uxores maritorum defunctorum habeant francum buncum suum de terris sockmannorum tenent' nomine dotis.*

Brañt. lib. 4.
Tract. 6. ca. 13.

F. N. B. 150. o.
Pl. Com. 413.

(Ante 33. b.)

[III. a.]

“*Que fueront a sa baron, &c.*” Here is implied by (&c.) that in some places the wife shall have the moiety of the lands of her husband, so long as she lives unmarried; as in gavelkinde. And of lands in gavelkinde a man shall be tenant by the curtesie without having of any issue. (1) In some places the widow shall have the whole, or halfe, *dum sola et costa vixerit*, and the like.

10. E. 3. Aide.
129.

(2) [See Note 132.]

(3) [See Note 133.]

(4) [See Note 134.]

(5) See as to the denomination of

Borough English and the subject in general, Append. to Robins. Gavelk.

[III. b.]

(1) [See Note 135.]

Sect. 167.

ITEM, en ascuns burghes, per le custome, home poit deviser per son testament ses terres et tenements, que il ad en fee simple deins mesme le burgh al temps de son morant; et per force de tiel devise, celui a que tiel devise est fait, apres le mort le devisor, poit entrer en les tenements issint a luy devises, a aver et tener a luy, solonque la forme et effect del devise, sans aucun liverie de seisin d'estre fait a luy, &c. (4)

ALSO, in some boroughs, by the custome, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whome such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the forme and effect of the devise, without any liverie of seisin thereof to be made to him, &c.

(5. Co. 73. b.) “**D**EVISER.” This is a French word, and signifieth *sermocinari* to speake, for *testamentum est testatio mentis, et index animi sermo* (2). So as a deviser per son testament is to speake by his testament, what his minde is to have done after his decease.

[m] Vide Sect. 58. “Per son testament.” *Testamentum est* [m] duplex. 1. *In scriptis*. 2. *Nuncupativum, seu sine scriptis*. And in some cities and boroughes, lands may [n] passe as chattels by will nuncupative or paroll without writing (3). *Revera* [o] *terminatum est, quod potest legari, ut catallum, tam hæreditas, quam perquisitum, per barones London’ et burgenfes Oxon. Ideo verum est, quod in burgis non jacet assisa mortis antecessoris*. But in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum* when it concerneth chattels.

4. E. 3. 53. “Ses terres ou tenements.” And by the same custome he may devise
7. H. 6. 1. a rent out of the same lands and tenements (5).
14. H. 8. 5.
22. Aff. 78. Abbr. Aff. 118. b.

4. E. 2. Mortdanc. 39. “Que il ad en fee simple.” For lands in taile are not devisable by
49. E. 3. 17. will; and therefore he in this place necessarily added (*que il ad en fee*
F. N. B. 196. *simple*) and purposely omitted the same in the clause concerning bo-
21. H. 6. 38. a. rough *English*; because there an estate taile is included.
7. E. 2. tit. Mortdanc.

F. N. B. 199. “Poit entrer.” Note, the custome of a city or borough concern-
Registr. in ex ing, the devise of lands is, *quod liceat unicuique civi sive bur-*
gravi Querela. *genfi, &c. ejusdem civitatis sive burgi tenementa sua in eadem civi-*
(10. Co. 46.) *tate sive burgo in testamento suo in ultimâ voluntate suâ, tanquam*
catalla sua, legare cuicunque voluerit, &c. [p] Now if a man

[p] 2. H. 6. 16. deviseth, either by speciall name or generally, goods or chattels
27. H. 6. 8. reall or personall, and dyeth, the devisee cannot take them
2. E. 4. 13. without the assent of the executors (6). But when a man is seised
21. E. 4. 21. of lands in fee, and deviseth the same in fee, in taile, for life, or for
4. H. 7. 16. yeares,

(2) See ante fol. 110. a. note 1.

(3) [See Note 136.]

(4) The &c. is not in L. and M.

(5) [See Note 137.]

(6) Acc. Perk. sect. 488. 570. and 572.

to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Devise*, A. a. and Com. Dig. *Administration*, C. 5.

yeares, the devisee shall enter; for in that case the executors have no meddling therewith. And in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in [q] the devisee before he doth enter, and in that case nothing [r] (having regard to the estate or interest devised) descendeth to the heire. But if the heire of the devisor entreth and holdeth the devisee out, he may either enter as *Littleton* here saith, or have his writ called *ex gravi querelâ*; and this writ (without any particular usage) is incident to the custome to devise; for otherwise, if a descent were cast before the devisee did enter, the devisee should have no remedy. After an actuall possession this writ lyeth not; for then the devisee may have his ordinary remedy by the common law.

[III. b.] And well said *Littleton*, that lands and tenements were devisable in burghes by custome; for that [s] at the common law no lands or tenements were devisable by any last will and testament, (1) nor ought to be transferred from one to another, but by solemne livery of seisin, matter of record, or sufficient writing (2); but as *Littleton* here saith, that by certain private customes in some burghes they are devisable. But now since *Littleton* wrote, by the statutes of 32. and 34. H. 8. lands and tenements are generally devisable (3) by the last will in writing of the tenant in fee simple, whereby the ancient [t] common law is altered, whereupon many difficult questions, and most commonly disherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen. But [u] these statutes take not away the custome to devise, (4) whereof *Littleton* speaketh: for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statutes is utterly void for a third, and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite*, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will [x] no more, but to make up the land so conveyed two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land; so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heire.

But if a man, holding some land of the king by knights service *in capite*, convey two parts of his land to the use of his wife for life, now (as hath beene said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so conveyed to his wife: for the intention of the act is to give power to dispose of two parts intirely.

[q] 4. Mar. Br. tit. Devise 49.

[r] Regist. fol. 244.

39. Aff. pl. 6.

3. E. 3. Devise 12. 29. Aff. 31.

34. E. 3. tit. Formedon. Pl.

post. 30. H. 8.

Devise 28.

F. N. B. 198,

199, &c.

Britton, fol.

212. b.

(Post. 240. b.

Cro. Cha. 201.

1. Sid. 191.)

[s] 27. H. 8.

cap. 10.

Britton, fol. 212.

78. b. 164.

Vide before in

this Sect.

32. H. 8. cap. 2.

34. H. 8. ca. 5.

[t] Vide 3. Co.

25, &c. in But-

ler and Baker's

case.

6. Co. 16. & 76.

8. Co. 84, 85.

9. Co. 133.

10. Co. 82, 83,

84. 11. Co. 24.

1. Co. 25. a.

[u] Dier 4. &

5. Phil. & Mar.

155. an. 6. E. 12.

Dalison. Patch.

20. Eliz. be-

tweene Barber

and his wife

plaintife, and

William Long

defendant, in a

writ of partition.

Bendloe's ad-

judged.

(9. Co. 133.)

[x] 6. Co. 17,

18. fir. Edward

Clerc's case.

3. Co. 34. b. Butler and Baker's case.

10. Co. 80, 81.

Leon. Lovey's

case.

Leon. Lovey's

case and Butler

and Baker's case,

ubi supra.

If

(1) [See Note 138.]

(2) See note 1. above.

(3) [See Note 139.]

(4) [See Note 140.]

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If the devisor leave a full third part of the land immediately to descend in fee simple or in taile, he may devise the other two parts in fee simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearly value, as *bona et catalla felonum et fugitivorum*, waives, estrayes, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such franchises of uncertaine value be holden of the king *in capite*, they shall restraine the devise of all his lands, and make it void for a third part. So it is if a man hath a reversion expectant upon an estate taile dry and fruitlesse holden of the king by knights service *in capite*, yet that shall restraine him to devise but two parts of his lands only. And where the statute speaks of a remainder, it is to be intended only of such a remainder as may draw ward and marriage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dyeth, this is such a remainder as is within the statute, although it be dry and fruitles. If a gift in taile or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knights service *in capite* in possession, reversion, or remainder, and is also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The values both of the third part and the two parts of the lands shall be taken as they happen to be at the time of the death of the devisor; for then his will takes effect.

(1. Sid. 56.)
Leon. Lovey's
case, ubi supra,
fol. 81.

3. Co. 84, 85.
Sir Richard Pex-
hall's case.
3. Co. 33. But-
ler and Baker's
case.

6. Co. 17, 18.
in Sir Edward
Clere's case.
(8. Co. 173.
Post. 271.
Cro. Cha. 38.)

He that holds by knights service in chiefe, deviseth by his will a rent, common, or other profits as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knights service, and not *in capite*, he may charge two parts of the knights service land as is aforesaid, and all his socage land, &c. And if he hath onely socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heire's two parts charged; and this is onely by force of the statute of 34. H. 8.

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will, by force, and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory. (5) But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will without any reference to his power by the feoffment, yet this will shall enure to declare the use upon the feoffment, because he had no power as owner of the land to devise any part of it. (1) But if the feoffment had been made to the use of his last will, although he deviseth the land

[112. a.]

(5) Adjudged acc. in Mytton and Lut-
wich, W. Jo. 7.

[112. a.]

(1) [See Note 141.]

land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment. (2) All which and many other points of intricate and abstruse learning you shall more largely read in my Reports.

“ *Sauns aucun liverie de seisin d'estre fait a luy, &c.*” For in his life time livery of seisin could not be made, because his will is ambulatorie till his death, and no estate passeth during his life; neither can livery be made after his decease, for then it cometh too late. 40. Aff. 38.

Here (&c.) (3) implyeth, that the devise is good without any attornment of any lessee or tenant.

Sect. 168.

NOTA, coment que home ne poit granter, ne doner, ses tenements a sa feme, durant le coverture, pur ceo que sa feme et luy ne sont forsque un person en ley; uncore per tiel custome il poit deviser per testament ses tenements a sa feme, a aver et tener a luy en fee simple, ou en fee taile, pur terme de vie, ou pur terme des ans, pur ceo que tiel devise ne prist effect forsque apres la mort le devisor; car tous devises ne-preignent effect forsque apres la mort le devisor. Et si home fait a divers temps divers testaments, et divers devises, &c. uncore le darrein devise et volunt fait per luy estoiera, et l'autres sont voides (5).

ALSO, though a man may not grant, nor give, his tenements to his wife, during the coverture, for that his wife and he be but one person in the law; yet by such custome he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple, or in fee taile, or for tearme of life, or yeares, for that such devise taketh no effect but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are voyd.

“ **H**OME ne poit granter, ne doner, ses tenements a sa feme, &c.”

This opinion is [a] cleere, for by no conveyance at the common law a man could during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the state is executed to such uses by the statute [b] of 27. H. 8. for an use is but a trust and confidence, which by such a mean might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that Littleton here yeeldeth (4).

[a] 4. H. 7.

[b] 27. H. 8.

cap. 10.

(Plowd. 111.

Dy. 106. a.

2. Ro. Abr. 783.)

“ *Durant le coverture.*” That is, during the continuance of the marriage. For to cover in *English* is *tegere* in *Latine*, and is so called, for that the wife is *sub potestate viri*, and she is disabled to contract

(2) [See Note 142.]

(3) See note 4. of fol. 111. a.

(4) See further on this subject ante note

1. fol. 3. a.

(5) The words *et l'autres sont voides* are not in L. and M. Roh. nor P.

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[c] Bracton, lib. 2. Ca. 15. tract with any without the consent of the husband. [c] *Omnia, quæ sunt uxoris, sunt ipsius viri. Non habet uxor potestatem sui, sed vir.*

Idem, lib. 5. Tract. 5. cap. 25. (Hob. 2. Cro. Eliz. 129. Plowd. 414.) 10. H. 7. 20. “*Un person en ley.*” *Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus. Res licet sit propria uxoris, vir tamen ejus custos, cum sit caput mulieris.*

If *Cestuy que use* had devised that his wife should sell his land, and made her executrix and dyed, and she tooke another husband, she might sell the land to her husband, for she did it *in autre droit*, and her husband should be in by the devisor (6).

“*Per testament.*” *Testamentum* is (as is said before) *testatio mentis*, (7), and is favourably to be expounded according to the meaning of the testator. *In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.* [112. b.]

[d] 4. E. 2. tit. Devise 23. “*A son feme.*” And Littleton himselfe yeeldeth the reason; [d] because the devise doth not take effect till after the decease of the devisor. And in some [e] places the custome is generall, that he may devise any lands, &c. in some [f] places lands onely which the devisor purchased; in some places that he may devise any estate; in some places for life onely, &c.

But albeit the last will doth not take effect untill after his decease, yet if a feme covert be seised of lands in fee, she cannot devise the same to her husband, because at the making of her will she had no power, being *sub potestate viri*, to devise the same; and the law intendeth it should be done by coercion of her husband.

2. H. 5. 8. 2. R. 3. 22. (Cro. Eliz. 9. Cro. Jam. 49. 290. 649.) “*Divers testaments.*” For *voluntas testatoris est ambulatoria usque ad mortem* (as hath beene said before) and the latter will doth countermand the first. And it is truly sayd, that the first grant and the last will is of the greatest force.

“*Divers devises, &c.*” Here by (&c.) is to be understood as well devises of chattels reall or personall, as of freehold and inheritance: also that in one will where there be divers devises of one thing, the last devise taketh place. *Cum duo inter se pugnancia reperiuntur, in testamento ultimum ratum est* (1).

Sect. 169.

ITEM, per tiel custome home poit deviser per son testament, que ses ex-
ecutors poyent alierer et vender ses tene-
ments que il ad en fee simple, pur cer-
taine summe de money, a distributer pur
son alme (2). En cest cas, coment que
le devisor devie s'isie de les tenements,
et

ALSO, by such custome a man
may devise by his testament, that
his executours may alien and sell the
tenements that he hath in fee simple,
for a certaine sum, to distribute for
his soule. In this case, though the
devisor die seised of the tenements,
and

(6) [See Note 143.]

(7) See the note on this sort of etymology
in fol. 110. a.

[112. b.]

(1) [See Note 144.]

(2) [See Note 145.]

et les tenements descendent a son heire; uncore les executors, apres le mort leur testator, poyent vender les tenements issint a eux devisees, et ouster l'heir, et ent faire feoffment, alienation et estate per fait, ou sans fait, a eux a queux le vend est fait. Et issint pois veier icy un cas, ou home poit faire loial estate, et uncore il n'avoit riens en les tenements al temps del estate fait. Et la cause est, pur ceo que la custome et usage ad este tiel (1). Quia consuetudo, ex certâ, causâ rationabili usitatâ, privat communem legem.

and the tenements descend unto his heire; yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heire, and thereof make a feoffment, alienation and estate by deed, or without deed, to them to whom the sale is made. And so may ye here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made. And the cause is, for that the custome and usage is such. For a custome, used upon a certain reasonable cause, depriveth the common law.

“*QUE ses executors poient aliener ou vender ses tenements.*” And that, which in *Littleton's* time a man might doe by custome, in some particular places, he may now doe by the statutes of 32. and 34. *H. 8.* generally.

32. *H. 8.* cap. 2a
34. *H. 8.* cap. 5.

“*Les executors apres le mort leur testator poient vender.*” Here it appeareth, that the executors having but a power, as *Littleton* putteth the case, to sell, they must all joyn in the sale. Then put the case, that one dies, it is regularly true, that being but a bare authoritie, the survivors cannot sel. But if a man deviseth his land to *A.* for terme of life, and that after his decease his lands shall be sold by his executors generally, (as *Littleton* here putteth his case) and make three or foure executors, and during the life of *A.* one of the executors dieth, and then *A.* dieth, the other two or three executors may sell, because the land could not be sold before, and the plurall number of his executors remaine. But if they had beene named by their names, as by *I. S. I. N. I. D.* and *I. G.* his executors, then in that case the survivors could not sell the same, because the words of the testator could not be satisfied; and I myself knew this case adjudged. [*] A speciall verdict was found, that *A.* was seised of certaine lands in fee, and devised the same in taile; and if the donee died without issue, that his said land should be sold by his sons in law, he in truth having five sons in law. One of his sons in law died in the life of the donee, and after the donee dyed without issue, and then the foure of the sonnes in law sold the land, and it was adjudged that the sale was good, because they were named generally by his sonnes in law, and the lands could not be sold by them all; and the words of the will in a benigne interpretation are satisfied in the plurall number, albeit that they had but a bare authority: but if they had been particularly named, it had been otherwise. But if a man deviseth lands to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land; because as the state, so the trust shall survive; and so note the diversity betweene a bare trust, and a trust coupled with an interest. In both those cases the execu-

49. *E. 3.* 16.
29. *Ass.* 17.
39. *Ass.* 17.
9. *H. 6.* 24.
15. *H. 7.* 12. 21.
14. *H. 8.* 6.
30. *H. 8.* tit.
Devise Br. 31.
2. *Eliz. Dyer* 177.
(6. *Co.* 16.
1. *Ro. Abr.* 328.
Mo. 61, 62. 147.
Cro. Cha. 382.)

(1. *Co.* 173.)
[*] *Hill.* 26. *El.*
inter Vincent &
Lee in the King's
Bench.
(*Cro. Eliz.* 26.
1. *Leon.* 285.
Mo. 147.
5. *Co.* 68.
Cro. Cha. 382.
1. *Ro. Abr.* 328.)

39. *Ass.* p. 17.
4. *Eliz. Dyer* 210.
23. *Eliz. Dier*
371. *Pasch.*
32. *Eliz. Ro.*
1307. in *Com-*
munj Banco, and
236. a. 315. b.)

so resolved in *Vincent's* case. (1. *Sid.* 6. *Post.* 181. b.)

tors

(1) &c. in *L.* and *M.*

Lib. 2. Cap. 10. Of Tenure in Burgage. Sect. 169.

[a] 1. Co. 173. in Digges's case. tors may [a] sell part of the land at one time, and part at another, as they may finde purchasfers.

In *Littleton's* case admit that one executor had refused to sell, then, as the law stood when *Littleton* wrote, it was cleare that the others could not sell. But now by the statute [b] of 21. H. 8. it is provided, that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficial law, it is by construction extended where lands are devised to executors to be sold. Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused, because he is party and privy to the last will, and remains executor still. Mine advice to them that make such devises by will, to make it as certaine as they can, is, that the sale bee made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate; unlesse his meaning be, they should take the profits of his lands in the meane time; and then it is necessary that he deviseth, that the meane profits till the sale shall be affets in their hands, for otherwise they shall not be so. But hereof thus much shall suffice (2).

[b] 21. H. 8. cap. 4.

(1. Leon. 60.)
Tr. 27. H. 8. in
the Common
Place, Serjeant
Bendloe's Re-
port.
(1. Rol. Abr.
329. 1. Leon.
87. 225.)

49. E. 3. 16.
38. Aff. 3.
39. Aff. 17.
13. E. 3. Devise
3. 14. H. 8. 10.
15. H. 7. 12. b.
(9. Co. 77. a.)
19. H. 6.
(1. Leon. 31.)

“*Et ent faire feoffment.*” For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounteth to an alienation, to vest the land in the feoffee, as it appeareth here, and the feoffee shall be in by the devisor.

“*Per fait ou sauns fait.*” And therefore if by the custome a man deviseth, that a reversion or any other thing that lyeth in grant shall be sold by the executors, they may sell the same without deed (3); for the vendee shall be in by the devisor, and not by the executors, as hath beene said.

“*Consuetudo ex certâ causâ rationabili usitatâ privat communem legem.*” *Quia consuetudo contra rationem introducta potius usurpatio quàm consuetudo appellari debet. Consuetudo præscripta et legitima vincet legem.*

4. E. 4. 4.
11. H. 4. 7.
39. H. 6. 39.
7. H. 6. 1, 2.
9. H. 6. 56. 8. H. 7. 4. 8. Eliz. Dier 247. (2. Roll. Abr. 266. 4. Inst. 274. 298. 303.)

“*Privat communem legem.*” For no custome or prescription can take away the force of an act of parliament (4); and therefore *Littleton* materially speaketh here of the common law.

(2) [See Note 146.]

(3) The case cited in the margin from

19. H. 6. is in fo. 23.

(4) See 115. a.

Sect. 170.

[113. b.] *ET nota, que nul custome est allowable, mesque tiel custome, que ad est use per title de prescription, scil. de temps dont memorie ne curt. Mes divers opinions ont este de temps dont memory, &c. et de title per prescription, que est tout un en ley. Car ascuns ont dit, que temps de memory serra dit de temps de limitation en un brieve de droit; scilicet, de temps le roy R. le 1. puis le Conquest, come est done per le statute de Westminster 1. pur ceo que le brieve de droit est le pluis haut brieve en sa nature, que poit estre. Et per tiel brieve home poit recover son droit de la possession son auncestors de pluis auncient temps, que home purroit per ascun brieve per le ley, &c. Et entant que il est done per le dit estatute, que en brieve de droit nul soit oye a demander de le seisin son auncestors del puis longe temps que de temps le roy R. avantdit, issint ceo est prove, que continuance de possession, ou auters customes et usages uses puis le dit temps, est le title de prescription, &c. Et hoc certum est. Et auters ont dit, que bien et verity est, que seisin et continuance puis le dit limitation (1) est un title de prescription, come est avantdit, et pur cause avantdit. Mes ils ont dit, que il y auxy un auter title de prescription, que fuit a la common ley devant ascun estatute de limitation de brieve, &c. et ceo fuit, lou un custome, ou un usage, ou auter chose, ad este use de temps dont memorie des homes ne curt a le contrarie. Et ils ont dit, que il est prove per le pleder un title de prescription de custome (2). Il dirra, que tiel custome ad este use de tempore cujus contrarium memoria hominum non existit, et ceo est autant a dire, quant tiel matter est plede, que nul home adonque en vie ad oye ascun prozse a le contrary, ne avoit ascun conusans a le contrary:*

AND note, that no custome is to bee allowed, but such custome, as hath bin used by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of mind, &c. and of title of prescription, which is all one in the law. For some have said, that time out of mind should bee said from time of limitation in a writ of right; that is to say, from the time of king Richard the first after the Conquest, as is given by the statute of Westminster the first; for that a writ of right is the most high writ in his nature, that may be. And by such a writ a man may recover his right of the possession of his ancestors of the most ancient time, that any man may by any writ by the law, &c. And in so much that it is given by the said estatute, that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time than of the time of king Richard aforesaid, therefore this is proved, that continuance of possession, or other customs and usages used after the same time, is the title of prescription, &c. And this is certaine. And others have said, that well and truth it is, that seisin and continuance after the limitation, &c. is a title of prescription, as is aforesaid, and by the cause aforesaid. But they have sayd, that there is also another title of prescription, that was at the common law before any estatute of limitation of writs, &c. and that it was, where a custome, or usage, or other thing, hath beene used, for time whereof minde of man runneth not to the contrary. And they have said, that this is proved by the pleading, where a man will plead a title of prescription of custome. Hee shall

(1) &c. in L. and M. and Roh.

(2) &c. in L. and M. and Roh.

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contrary; et tant que tiel title de prescription fuit a le common ley, et nient ouste per ascun estatute, ergo, il demurt come il fuit a le common ley; et le plus tost, tant que la dit limitation de briefe de droit (3) est de cy long temps passé (4). Ideo de hoc quære. Et plusors auters customes et usages ont tiels ancient burghes.

was at the common law, and not put out by an estatute, ergo, it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right is of so long time passed. Ideo quære de hoc. And many other customes and usages have such ancient boroughes.

(4. Co. Luttrell's case. 9. Co. 57. 2. Roll. Abr. 265, 266. 1. Sid. 161. 1. Roll. Abr. 560, 566. Cro. Cha. 175.) (4. Co. 36.)

PRESCRIPTION. Prescription is a title taking his substance of use and time allowed by the law. *Præscriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis.* In the common law a prescription, which is personal, is for the most part applyed to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors; for as a naturall body is said to have ancestors, so a body politique or corporate is said to have predecessors. And a custome, which is locall, is alledged in no person, but layd within some mannor or other place. As taking one example for many. *I. S.* seised of the mannor of *D.* in fee prescribeth thus: that *I. S.* his ancestors, and all those whose estate he hath in the sayd mannor, have time out of minde of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the sayd mannor. This properly we call a prescription. A custome is in this manner. A copyholder of the mannor of *D.* doth plead, that within the same mannor, there is and hath beene such a custome time out of mind of man used, that all the copyholders of the said mannor have had and used to have common of pasture, &c. in such a wast of the lord, parcell of the said mannor, &c. where the person neither doth or can prescribe, but alledgeth the custome within the mannor. But both to customes and prescriptions, these two things are incidents inseparable, viz. possession or usage, and time. Possession must have three qualities: it must be long, continual, and peaceable; *longa, continua, et pacifica*: for it is said, *transferuntur dominia, sine titulo, et traditione, per usucaptionem, scil. per longam, continuam, et pacificam possessionem.* *Longa, i. e. per spatium temporis per legem definitum*, of which hereafter shall be spoken. *Continuam dico, ita quod non sit legitime interrupta.* *Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa.* *Ut si verus dominus, statim cum intrusor vel disseisor ingressus fuerit seisinam, nitatur talis viribus repellere, et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen cum asjecerit, diligens sit ad impetrandum et prosequendum.* *Longus usus nec per vim, nec clam, nec precario, &c.*

(6. Co. 60. a. 65. b. 66.)
12. E. 4. 1, 2.
Mariæ, Br.
Prescr. 100.
6. E. 6. Dy. 71.
14. E. 3.
Bar. 277.
43. E. 3. 32.
7. H. 6. 26.
22. H. 6. 14.
16. E. 2. tit.
Prescript. 53.
45. Ass. 8.
40. Ass. 27. 41.
21. E. 4. 53, 54.
(9. Co. 57.)

Bracl. fo. 51, 52.

Bracl. fol. 222. b.

13. E. 4. 6.

If a man prescribeth to have a rent, and likewise to take a distresse for the same, it cannot bee avoyded by pleading, that the rent hath beene alwayes paid by coercion, albeit it began by wrong.

“ U₂

(3) &c. in L. and M. and Roh. (4) &c. in L. and M. and Roh.

[114. a.]

"*Un title de prescription.*" Seeing that prescription maketh a title, it is to be seene; first, to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption.

For the first, as to such franchises and liberties as cannot be seised as forfeited, before the cause of forfeiture appeare of record, no man can make a title by prescription, because that prescription being but an usage *in pais*, it cannot [*] extend to such things as cannot bee seised, nor had, without matter of record: as to the goods and chattels of traitors, felons, felons of themselves, fugitives, of those that be put in exigent, deodands, consufance of pleas, to make a corporation, to have a sanctuary, to make a coroner, &c. to make conservators of the peace, &c. (1).

[114. b.]

Doc. Plac. 103. 2. Roll. Abr. 270.) [*] Fleta, lib. 1. cap. 25. Brit. f. 6. & 15. 44. Aff. p. 8. 49. E. 3. 3. Stanf. Pl. Cor. 21. 51. 5. Co. 109, 110. 9. Co. 29. (Post. 195. a. 2. Roll. Abr. 114. 265.) (2. Ro. Abr. 270. 9. Co. 29. Post. 195. a.)

[e] But to treasure trove, waifes, estraies, wrecke of sea, to hold pleas, courts of leets, hundreds, &c. infange thiefe, outfange thiefe, to have a parke, warren, royall fishes; as whales, sturgions, &c. fayres, markets, franke foldage, the keeping of a gaole, tolle, a corporation by prescription, and the like, a man may make a title by usage and prescription onely without any matter of record. [*] *Vide* Sect. 310. where a man shall make a title to lands by prescription.

But it is to be observed, [f] that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona et catalla proditorum, felonum, &c.* yet may they and the like bee had obliquely, or by a meane by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla proditorum, felonum, &c.*

Prescr. 57. 44. Aff. pl. [*] 8. H. 6. 16. [f] 12. E. 4. 16. 32. H. 6. 25. 12. Eliz. Dier 288, 289. 11. E. 3. tit. Issue 40. (2. Ro. Abr. 271. 2. Inst. 19. Cro. Jam. 155, 156. 454.) 15. E. 3. tit. Judgment 133. 14. E. 3. ibid. 155.

As to the second, by what meanes a title by prescription, or custome, may be lost by interruption. It is to be knowne, that the title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right; as if a man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right.

In a writ of mesne the plaintife made his title by prescription, that the defendant and his ancestors had acquitted the plaintife and his ancestors and the terre-tenant time out of minde, &c. the defendant tooke issue, that the defendant and his ancestors had not acquitted the plaintife and his ancestors and the terre-tenant; and the jury gave a special verdict that the grandfather of the plaintife was enfeoffed by one *Agnes*, and that *Agnes* and her ancestors were acquitted by the ancestors of the defendant time out of minde before that time, since which time no acquittall had beene; and it was adjudged and affirmed in a writ of error, that the plaintife should recover his acquittall, for that there was once a title by prescription veiled,

(1) See an observation on this doctrine the peace, in 2. Hawk. Pl. C. b. 2. c. 8. against prescribing to make conservators of f. 10.

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vested, which cannot be taken away by a wrongfull *cesser* to acquite of late time: and albeit the verdict had found against the letter of the issue, yet for that the substance of the issue was found, viz. a sufficient title by prescription, it was adjudged both by the court of common pleas, and in the writ of error by the court of king's bench for the plaintife; which is worthy of observation. So a *modus decimandi* was alledged [*] by prescription time out of minde for tithes of lambes; and thereupon issue joyned; and the jury found, that before twenty yeares then last past there was such a prescription, and that for these twenty yeares he had paid tithe lamb *in specie*. And it was objected, 1. That the issue was found against the plaintife, for that the prescription was generall for all the time of prescription, and twenty years fail thereof. 2. That the party by payment of tithes *in specie* had waived the prescription or custome. But it was adjudged for the plaintife in the prohibition; for albeit the *modus decimandi* had not bin paid by the space of twenty yeares, yet, the prescription being found, the substance of the issue is found for the plaintife. And if a man hath a common by prescription, and taketh a lease of the land for twenty yeares, whereby the common is suspended, after the yeares ended, he may claime the common generally by prescription, for that the suspension was but to the possession and not to the right, and the inheritance of the common did alwayes remaine; and when a prescription or custome doth make a title of inheritance (as *Littleton* speaketh), the partie cannot alter or waive the same *in pais* (2).

[*] Mich. 43.
& 44. Eliz. in a
prohibition be-
tweene Nowell
pl. and Hicks
vicar of Edmon-
ton defendant in
the King's
Bench.
(2. Co. 5. Shop of
Winton's case.
6. Co. 69.
3 Co. 9. 2. Ro.
Abr. 292.)

(Dr. & Stud.
17. a.)
[e] Bracton, fol.
314.

"*Temps dont memory, &c. et de title per prescription, que est tout un en ley.*" So as the time prescribed or defined by law is, time whereof there is no memorie of man to the contrary. [e] *Omnis querela, et omnis actio injuriarum, limita infra certa tempora.*

(1. Ro. Abr.
685.)

"*Temps de limitation.*" Limitation, as it is taken in law, is a certaine time prescribed by statute, within the which the demandant in the action must prove himselfe or some of his ancestors to be seised.

[f] Regist. 158.
Bract. fo. 373.
5. Aff. p. 2.
34. H. 6. 40.
[g] Stat. de
Mert. 20. H. 3.
ca. 8.
[b] West. 1. an.
3. E. 1. c. 8.
Vide W. 2.
13. E. 1. ca. 46.
[i] Mirror ca. 5. sect. 1.

"*En brieve de droit.*" In [f] ancient time the limitation in a writ of right was from the time of H. 1. whereof it was said *à tempore regis Henrici senioris*. After that by the statute of [g] *Merton* the limitation was from the time of H. 2. and by the statute [b] of W. 1. the limitation was from the time of R. 1. And this is that limitation, that *Littleton* here speaketh of. Whereof in the *Mirror* in reproofe of the law it is thus said: [i] *Abusio est de counter cy longe temps, dont nul ne poet testmoigner de vieu et de oyer, que ne dure my generalment oufier 40 ans.*

Glanvil. li. 13.
ca. 3. & 34.
Mirror, ca. 5.
sect. 4. Fleta,
1. 2. c. 38. &
1. 4. c. 5. Brit-
ton, fol. 79. 82.
Bracton, l. 2. f. 52. & f. 179. 253. 373.

Time of limitation is twofold: first, in writs; and that is by divers acts of parliament: secondly, to make a title to any inheritance; and that (as *Littleton* here saith) is by the common law.

Limitation of times in writs is provided by the said statute of *Merton* (1), and after by the said statute of W. 1. which *Littleton* here

[115. a.]

(2) It is observable, that mr. serjeant Rolie has incorporated most of the preceding passages relative to prescription into his Abridgment. See Ro. Abr. tit. *Prescription*, and the additional matter in Vin. Abr. same

title R.—S.—T.

[115. a.]

(1) See cap. 39. and lord Coke's Commentary upon it in 2. Inst. 238.

here citeth, and which was in force when he wrote, but is since altered by a profitable and necessary statute [k] made *anno* 32. H. 8. and by that act, the former limitation of time in a writ of right is changed and reduced to threescore yeares next before the *teste* of the writ; and so of other actions, as by the statute at large appeareth. But it is to be observed, that this act of 32. H. 8. extendeth [l] not to a *formedon* in the *discender* (2), nor to the services of escuage homage and fealty (3), for a man may live above the time limited by the act. Neither doth it extend to any other service, which by common possibility may not happen or become due within sixty yeares, as to cover the hall of the lord, or to attend on his lord when he goeth to warre, or the like; nor where the seisin is not traversable or issuable (4). Neither doth it extend to a rent created by deed (5), nor to a rent reserved upon any particular estate; for [m] in the one case the deed is the title, and in the other the reservation; nor to any writ of right of advowson, *quare impedit*, or assise of *darreine presentment* (for there was a parson of one of my churches that had been incumbent there above fifty yeares, and dyed but lately) or any writ of right of ward, or ravishment of ward, &c. but they are left as they were before the statute of 32. H. 8. (6). But hereof thus much for the better understanding of *Littleton* shall suffice (7).

[k] 32. H. 8. cap. 2. See the second part of the Institutes. Merton, c. 8. [l] Mich. 10. & 11. Eliz. Dyer 278. Fitzwilliam's case.

4. Co. 10. & 11. Bevel's case. [m] 8. Co. 65. fir William Foster's case.

1. Mar. Parliam. 2. cap. 5. Vide 17. E. 3. 11. Pl. Com. 371. b.

Vide 34. H. 6. 36.

"*De temps le roy R. 1.*" And that was intended from the first day of his raigne; for (*from the time*) being indefinitely, doth include the whole time of his raigne, which is to be observed.

"*Briefe de droit*," *Breve de recto*, a writ of right; so called, for that the words in the writ of right are, *quod sine dilatione plenum rectum teneas*.

"*Title de prescription al common ley, &c. de temps dont memorie des homes ne curge al contrarie.*" *Docere oportet longum tempus, & longum usum illum, viz. qui excedit memoriam hominum; tale enim tempus sufficit pro jure.*

Bract. lib. 4. fol. 230. Fleta, lib. 4. cap. 24. (5. Co. 72. Dr. & Stud. 16. b.)

"*Afcun prooffe al contraire.*" For if there be any sufficient prooffe of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man: for memory or knowledge is two-fold. First, by knowledge by prooffe, as by record or sufficient matter of writing. Secondly, by his owne proper knowledge. A record or sufficient matter in writing are good memorialls; for *litera scripta manet*. And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said, *tradere memorie*. And this is the reason, that regularly a man cannot prescribe or alledge a custome against a statute, because that is matter of record, and is the highest prooffe and matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription or custome is saved or preserved by another act of parliament.

(8. Co. 121.) 28. Aff. 25. 38. Aff. 18. 45. E. 3. 26. 5. H. 7. 10. 8. H. 7. 7. 11. H. 7. 27. Dyer 23. Eliz. 273.

There is also a diversity betweene an act of parliament in the negative and in the affirmative; for an affirmative act doth not take

(2. Ro. Abr. 266. 4. Inst. 274. 298. 303. 2. Rol. Abr. 266.)

2. Inst. 20. 11. Co. 63. 12. Co. 22. Plow. 207. Cro. Jam. 313. 2. Rol. Abr. 266.)

away

(2) [See Note 148.]

(5) [See Note 150.]

(3) Acc. 3. Lev. 21.

(6) [See Note 151.]

(4) [See Note 149.]

(7) [See Note 152.]

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away a custome (8); as the statutes of wills of 32. and 34. H. 8. doe not take away a custome to devise lands, as it hath been often adjudged. Moreover, there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there aswell as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for, as our author saith, *consuetudo, &c. privat communem legem* (9). As the statute of *Magna Charta* provideth that no leet shall be holden but twice in the yeare (10), yet a man may prescribe to hold it oftener, and at other times (11); for that the statute [n] was but in affirmance of the common law (12).

So the statute [o] of 34. E. 1. (13) provideth, that none shall cut downe any trees of his owne within a forest without the view of the forrester; but inasmuch as this act is in affirmance of the common law (14), a man may prescribe to cut downe his woods within a forest without the view of the forester (15). And so was it adjudged in 16. Eliz. in the exchequer by sir *Edward Sanders* chiefe baron, and other the barons of the exchequer, as sir *John Popham* chiefe justice of the king's bench reported to me.

In the eire of the forest of *Pickering*, before *Willoughby Hungerford* and *Hanbury* justices itinerants there, anno 8. E. 3. I reade [p] a claime made by *Henry de Percy*, lord of the manor of *Semor* within the said forest. The foresters, verderours, and regards found his claime to be true, viz. *quod prædictus Henricus de Percy, & omnes antecessores sui tenentes manerium prædictum, à tempore quo non extat memoria, & sine interruptione aliquali, tenuerunt prædictum manerium cum pertinentiis extra regardum forestæ, & habuerunt woodwardum portantem arcum & sagittas ad præsentandum præsentandâ de venatione tantum, &c. & habuerunt in boscis suis de Semere forgeas & mineras, & amputârunt, dederunt, & vendiderunt boscum suum infra manerium prædictum, sine visu forestariorum pro voluntate suâ, & fugârunt & ceperunt vulpes, lepores, capreolos, &c. sicut idem Henricus Percy superius clamat.* Which claime by prescription, and found as is aforesaid, the justices doubted onely of two points. The first, forasmuch as the said manor was within the limits of the forest, it should not onely be *contra assisum forestæ*, for his woodward to beare bow and arrowes, where by law he ought to beare but an hatchet, and no bow nor arrowes within the forest, but also *de facili cedere possit in destructionem ferarum, &c.* and they therefore doubted whether it might bee claimed by prescription. Their second doubt was concerning *fugationem & captionem capreolorum in boscis suis prædictis, eò quod est bestia venationis forestæ, & transgressores inde convicti finem facerent ut pro transgressione venationis*: and for that difficulty, the claime was adjourned into the king's bench. But of the other parts of the prescription no doubt at all was made; and the like had been allowed in the same eire, as in the case of *Thomas* lord *Wake* of *Lydell*, and of *Gilbert* of *Acton*, in the same eyre, Rot. 37. and of others.

[115. b.]

“ *Il est prove per le pleader.*” Note, one of the best arguments or proofes in law is drawne from the right entries or course of pleading;

(8) [See Note 153.]

(9) [See Note 154.]

(10) [See Note 155.]

(11) [See Note 156.]

(12) [See Note 157.]

(13) [See Note 158.]

(14) Acc. Manw. Forr. L. 1st ed. 41. a. and Fitz. Abr. *Trespays* 239. there cited.

(15) [See Note 159.]

Magna Charta,
cap. 35.
(2. Leon. 28.)
[n] 6. H. 7. 2.
8. H. 4. 34.
12. H. 7. 18.
31. H. 6. Leet 11.
18. H. 6. 13.
[o] 34. E. 1.
tit. Forest.
Rast. 1. E. 3.
cap. 2.
(Doc. Plac. 342.
2. Rol. Abr. 266.
Ante 2. Post.
165. b. 233. a.
Cro. Jam. 155.
Dr. & Stud. 164.)
[p] Itin. Pickering
ann. 8. E. 3.
Rot. 38.

(8. Co. 136.
Cro. Jam. 155.)

(Post. 126. a.
283. a. Ante 17.
a. 10. Co. 88.
1. Sid. 336.)

ing; for the law it selfe speaketh by good pleading; and therefore *Littleton* here saith, it is proved by the pleading, &c. as if pleading were *ipsius legis viva vox*.

“*Entant que tiel title per prescription fuit al common ley, &c.*” Note, all the prescriptions that were limited from a certaine time were by act of parliament, as from the time of *H. 1.* which was the first time of limitation set downe by any act of parliament, and so from the raigne of *R. 1. &c.* But this prescription of time out of memory of man was (as *Littleton* here saith) at the common law, and limited to no time. Also here is implied a maxime of the law, viz. that whatsoever was at the common law, and is not ousted or taken away by any statute, remaineth still.

“*Common ley.*” The law of *England* is divided, as hath beene said before, into three parts; 1. the common law, which is the most generall and ancient law of the realme, of part whereof *Littleton* wrote; 2. statutes or acts of parliament; and 3. particular customes (whereof *Littleton* also maketh some mention). I say particular, for if it be the generall custome of the realme, it is part of the common law. (Ante 110. b. Post. 344. a.)

The common law hath no controler in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remaines still, as *Littleton* here saith. The common law appeareth in the statute of *Magna Charta* and other ancient statutes (which for the most part are affirmations of the common law) in the originall writs, in judiciall records, and in our bookes of termes and yeares. Acts of parliament appeare in the rolls of parliament, and for the most part are in print. Particular customes are to be proved. (Pref. to 8th Co.)

Sect. 171.

ITEM, chescun burgh est un ville, mes nemy è converso. Plus serra dit de custome en le Tenure de Villenage.

ALSO, every borough is a towne, but not è converso. More shall bee sayd of custome in the Tenure of Villenage.

“*VILLE,*” villa, quasi vebilla, quòd in eam convebantur fructus.

And it is called *vicus*, because it is *prope viam*. *Villa est ex pluribus mansionibus vicinata, & collata ex pluribus vicinis.* If a town be decayed so as no houses remaine, yet it is a towne in law. And so if a borough be decayed, yet shall it send burgessees to the parliament, as Old *Salisbury* and others doe. It cannot be a towne in law, unlesse it hath, or in time past hath had, a church, and celebration of divine service, sacraments and burials. What alteration hath beene made in townes, heare what a great lawyer saith. *In Anglià villula tam parva inveniri non poterit, in quâ non est miles, armiger, vel paterfamilias, &c. magnis ditatus possessionibus, necnon liberi tenentes alii & valetti plurimi, suis patrimoniis sufficientes, &c.* And it appeareth by *Littleton*, that a towne is the *genus*, and a borough is the *species*; for hee saith that every borough is a towne, but every

(2. Inst. 669.)

Vid. Linwood verbo Vicus.

Bract. lib. 5. fol. 434. & lib. 2.

fol. 211. Fortescue, cap. 29.

7. E. 6. Fines levie de terre.

Br. 91.

34. E. 1. Quare imp. 187.

Fortescue, cap. 29.

Fortescue, cap. 24.

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towne is not a borough. *Et sub appellatione villarum continentur burgi & civitates.*

Domesday,
Glouc.

Berewica, or *berewit*, in *Domesday* signifieth a town. *Hæ bere-* [116. a.]
wicæ pertinent ad Berchley. (*Et sic recitat plus quàm viginti villas.*)

There be in *England* and *Wales* eight thousand eight hundred and three townes, or thereabouts.

Bract. ubi sup.
Flet. li. 4. c. 15.
& lib. 6. ca. 49.
Brit. fo. 124, &
274, &c.

See more *de villis, parochiis et hamlettis*, in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what *Littleton* saith (1).

(1) [See Note 160.]

CHAP. II.

Of Villenage.

Sect. 172.

TENURE en villenage est plus proprement, quant un villein tient de son seignior, a que il est villein, certaine terres ou tenements solonque le custome del manor, ou auterment, a la volunt son seignior, et de faire a son seignior villein service; come de porter et de carier le fime le seignior hors del city, ou del manor (2) son seignior, jesques a le terre son seignior, en gisant ceo (3) sur le terre, et hujusmodi. Et ascuns franke homes teignent lour tenements solonque le custome del certaine manors, per tiels services. Et lour tenure auxy est appel tenure en villenage, et uncore ils ne sont pas villeines; car nul terre tenus en villenage, ou villeine terre, ne ascun custome surdant de la terre, ne unques ferra franke home villein. Mes un villein puit faire franke terre d'estre villein terre a son seignior. Sicome lou un villein purchase terre en fee simple, ou en fee taile, le seignior del villein poet enter en la terre, et ouste le villein et ses heires a tous jours; et puis le seignior (s'il voloit) puit lesser mesme la terre a le villeine, a tener en villenage.

TENURE in villenage is most properly, when a villeine holdeth of his lord, to whom he is a villeine, certain lands or tenements according to the custome of the manor, or otherwise, at the will of his lord, and to doe to his lord villeine service; as to carry and recarry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and to spread the same upon the land, and such like. And some free men hold their tenements according to the custome of certaine manors, by such services. And their tenure also is called tenure in villenage, and yet they are not villeines; for no land holden in villenage, or villein land, nor any custome arising out of the land, shall ever make a free man villeine. But a villeine may make free land to bee villeine land to his lord. As where a villeine purchaseth land in fee simple, or in fee taile, the lord of the villeine may enter into the land, and oust the villeine and his heires for ever; and after, the lord (if hee will) may let the same land to the villein, to hold in villenage.

“**T**ENURE en villenage.” Villeine is from the French word *villaine*, and that à villa, quia villa adscriptus est; for they which are now called *villani*, of ancient times were called *adscriptitii*. And in the common law he is called *nativus*; quia pro majore parte natus est servus: and this is hee which the civilians call *servus*. [a] Theyn in the Saxon tongue is *liber*, and then, *servus*. Theme (sometimes written *theame* corruptly) is an old Saxon word, and signifieth *potestatem habendi in nativos sive villanos, cum eorum sequelis, terris, bonis et catallis*. But *teame*, sometime corruptly written *theame*, is of another signification; for it is also an old Saxon word, [b] and signifieth, where a man cannot produce his warrant of that which hee bought according to his voucher.

Lib. Rub. 76. & 77.
Glanv. li. 5. ca. 1. & 2, &c.
Vide Bract. li. 1. ca. 6, &c.
Brit. fo. 77. & 67. 82. 97. 98. 125. 126. 147.
Flet. li. 1. c. 3.
Flet. li. 2. cap. 44.
Idem, li. 4. cap. 11. & 12.
Mir. ca. 2. sect. 18. Ockam.

(F. N. B. 77. a.) [a] Flet li. 1. ca. 24. [b] Vide Lamb. inter leges Sanct. Edw. fo. 132. nu. 25.

“*Villenage*,” *Villanagium*, (as in like cases hath been sayd where the termination is in *age*) is the service of a bondman. And yet a free

(2) In L. and M. and Rob. the words are *del cite* (which seems used in the same sense as *scite*) *del manor*.

(3) Instead of *en gisant ceo*, the words in L. and M. and Rob. are *gisant warrette et de spreader le fyme le seignior*.

free man may doe the service of him that is bond. And therefore a tenure in villenage is twofold; one, where the person of the tenant is bond, and the tenure servile; the other, where the person is free, and the tenure servile. [c] *Serua terra liberos de sanguine existentes, villanos facere non potest.* And therefore it is said, [d] *est enim ratio et regula generalis in istis duobus casibus, quod liber homo nihil libertatis propter personam suam liberam confert villenagio, nec liberum tenementum* [116. b] *è contrario mutat statum aut conditionem villani.* And againe, [e] *Villenagium vel servitium nihil detrabit libertati; habita tamen distinctione utrum tales sint villani, et tenuerunt in villano socagio de dominio domini regis.* And againe, [f] *Tenementum non mutat statum liberi non magis quam servi; poterit enim liber homo tenere purum villenagium, faciendo quicquid ad villanum pertinebit, et nihilominus liber erit, cum hoc faciat ratione villenagii, et non ratione personæ suæ: et ideo poterit, quando voluerit, villenagium deserere, et liber discedere, nisi illaqueatus sit per uxorem nativam ad hoc faciendum, ad quam ingressus fuit in villenagium, et quæ præstare poterit impedimentum, &c.* And againe, [g] *Parum villenagium est, à quo præstatur servitium incertum et indeterminatum, ubi scire non poterit vespere quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit.* And another faith to the same intent, *Ceux ne sçavoient le vespere, de quoy ils servent en la matyn.* [h] *Fuerunt in Conquestu liberi homines, qui liberè tenuerunt tenementa sua per libera servitia, vel per liberas consuetudines; et cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servilia, sed certa et nominata, &c. et nihilominus liberi, quia, licet faciunt opera servilia, cum non faciunt eâ ratione personarum, sed ratione tenementorum, &c.*

How villenage or servitude began, and for what cause, it is said, [i] *Ab homine et pro vitio introducta est servitus. Sed libertas à Deo hominis est indita naturæ. Quare ipsa ab homine sublata, semper redire gliscit, ut facit omne quod libertate naturali privatur.* And another faith, [k] that the condition of villeines from freedome unto bondage, of ancient time grew by constitutions of nations. [l] *Fiunt etiam servi liberi homines captivitate de jure gentium,* and not by the law of nature, as from the time of Noab's Flood forward, in which time all things were common to all, and free to all men alike, and lived under the law naturall; and by multiplication of people, and making proper and private those things that were common, arose battels. And then it was ordained by constitution of nations, that none should kill another; but that he that was taken in battell, should remain bond to his taker for ever, and he to doe with him, and all that should come of him, his will and pleasure, as with his beaſt, or any other chattell, to give, or to sell, or to kill: and after it was ordained, for the cruelty of some lords, that none should kill them, and that the life and members of them, as well as of freemen, were in the hands and protection of kings, and that he that killed his villeine, should have the same judgment as if he had killed a freeman. Thereupon they were called *servi, quia servabantur à dominis et non occidebantur, et non à serviendo.* He is called *nativus, à nascendo, quia plerumque natus est servus;* and he is called *villanus,* for that he doth his villeine service in *villis.*

Est autem libertas naturalis facultas ejus, quod cuique facere libet, nisi quod de jure, aut vi prohibetur. Servitus est constitutio de jure gentium, quâ quis domino alieno contra naturam subjicitur. And againe,

Et

(F. N. B. 12.
2. Rol. Abr. 73.)
[c] Hil. 29. E. 1.
Coram reg. Ebor.
in thesaur.
[d] Braçt. li. 4.
fo. 170.
[e] Idem, li. 1.
ca. 6.
Brit. c. 31. & 66.
Flet. li. 1. ca. 3.
[f] Braçt. fo. 26.
43. E. 3. 5. acc.

[g] Braçt. li. 4.
fo. 208.
Brit. ca. 31.

[h] Braçt. li. 1.
fo. 7.

[i] Fortesc.
ca. 42.

[k] Brit. ca. 31.
[l] Braçt. li. 1.
ca. 6.
Flet. li. 1. ca.
3. & ca. 5.
Mir. cap. 2.
sect. 18.

(F. N. B. 77. f.)
Braçt. li. 1. ca. 6.
B. itton, ca. 31.
& ubi sup.
Fleta, lib. 1. ca. 2. & 3.

[*m*] Et tout soyt que tous creatures duissent este frank solonque le ley de nature; per constitution nequidant, et fait de homes sont auters creatures enser-vies, sicome est dit beasts en parkes, pissons en ser-vors, et oyseux en cages.

[*m*] Mirror, cap. 2. sect. 18.

[*n*] This is assured, that bondage or servitude was first inflicted for dishonouring of parents; for *Cham* the father of *Canaan* (of whom issued the *Canaanites*) seeing the nakednes of his father *Noah*, and shewing it in derision to his brethren, was therefore punished in his sonne *Canaan* with bondage. And herewith agreeth the divine: *Ante vini inventionem inconcussa libertas. Non esset hodie servitus, si ebrietas non fuisset.*

[*n*] Mirror, cap. 2. sect. 18.
Genesis ix. vers. 10, 11, &c.
Ambrose.

17. a.] “*Hors del citie ou del mannor, &c.*” This is false printed, for the originall is, *hors del scite del mannor*, and so would it be amended in the impressions of the booke hereafter.

“*Et ascuns frank homes teignent, &c.*” This is apparent enough, especially upon that which hath beene said.

Mirror, cap. 2. sect. 18. acc.

“*Ou un villeine purchase terre en fee simple.*” Yet the villeine may purchase some kinde of inheritances in fee simple, which the lord of the villeine cannot have. As if a villeine purchase a common *sauns number*, the lord shall not have it; for the lord may surcharge the same, which should be a prejudice to the terre-tenant: and the same law of a *corodie incertaine* granted to a villeine, and such like inheritances. And therefore *Littleton* materially said, *purchase terre*. When the villeine hath an estate of any thing certaine, the lord shall have it; as a rent granted to the villeine, commons certaine, estovers certaine, and such like. [*o*] But that which lyeth in action, as a warranty made to the villeine his heires and assignes, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant, or other thing in action made to the villeine; because they lye in privity, and cannot be transferred to others.

Mirror, cap. 2. sect. 18.

22. Aff. p. 37.

[*o*] Doct. and Stud. ca. 43.
(3. Co. 62, 63.
2. Ro. Abr. 742.
Post. 120. a.)

[*p*] If a man be lessee of a villeine for life, for yeares, or at will, and the villeine purchaseth lands in fee; if the lessee entreth into the lands, he shall hold the lands as a perquisite to him and his heirs for ever. But if a bishop hath a villeine in the right of his bishopricke, and he purchaseth lands, and the bishop entreth, the bishop shall have this perquisite to him and his successors, and not to him and his heirs; for the law respecteth the quality, and not the quantity of his estate. So if executors have a villeine for yeares, and the villeine purchase lands in fee, and the executors enter, they shall have a fee simple, but it shall be affets.

[*p*] L. 5. E. 4. 61.
18. E. 3. 29.
21. H. 6. 37.
Bro. tit. Vil. 70.
(Plow. 235. a.
Ante 90. 4.)

“*Fee taile.*” By this it is apparant, that if lands bee given to a villeine, and to the heires of his body, the lord may enter and put out the villeine and the heires of his body; for *quicquid acquiritur servo acquiritur domino* (1). And in this case the lord gaines a fee simple determinable upon the dying of the villeine without heire of his body; and the absolute fee simple remaineth still in the donor. And if the lord enter, and after infranchise the donee, and after the donee hath issue, yet that issue shall never have remedy either by *formedon*

15. E. 4. 9. b.
Pl. Com. 555. in
Walsingham's
case.

or

(1) [See Note 161.]

or entry, to recover this land, by force of the statute of *donis conditionalibus*; for that statute giveth remedy to the issues of the donee, that have capacity and power to take and retaine such a gift; and the title of the lord remaines, as it did at the common law, for the statute restraineth acts done only by the tenant in taile. And so it is, if lands be given to an alien, and to the heires of his body, upon office found, the land is seised for the king, afterwards the king makes the alien a denizen, who hath issue and dyeta, the king shall detaine the land against the issue.

Sect. 173.

ET nota, si feoffment soit fait a certaine person ou persons en fee, al use de un villeine; ou si un villeine, ove auters persons, soient enseoffes al use le villeine; quel estate que le villeine ad en le use, en fee taile, pur terme de vie ou d'ans, le seignior del villeine poit entrer en tous ceux terres et tenements, sicome le villeine ust este sole seisie del demesne. Et c'est per l'estatute de anno 19. H. 7. cap. 15. (2).

AND note, if a feoffment be made to a certaine person or persons in fee, to the use of a villeine; or if a villeine, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee taile, for terme of life or years, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demesne. And this is given by the statute of anno 19. H. 7. ca. 15.

THIS is an addition to *Littleton*; and the statute of 19. H. 7. ca. 15. therein mentioned, for the cause that hath beene aforesaid, hath lost his force (3).

Sect. 174.

[117. b.]

MES si ascun franke home voile prendre ascun terres ou tenements, a tener de son seignior per tiel villein service, scil. a payer un fine a luy (1) pur le mariage de ses fits ou files, donque il paiera tiel fine pur le mariage; et nient obstant que il est le follie de tiel frank home de prendre en tiel forme terres ou tenements a tener de le seignior per tiel bondage, uncore ceo ne fait le franke home villeine (2).

BUT if a free man will take any lands or tenements, to hold of his lord by such villeine service, viz. to pay a fine to him for the marriage of his sonnes or daughters, then he shall pay such fine for the marriage; and notwithstanding though it be the folly of such free man to take in such forme lands or tenements to hold of the lord by such bondage, yet this maketh not the free man a villeine.

[117. b.]

(2) This Section was first introduced in Redman's edition.

(3) [See Note 162.]

(1) In Roh. the words *pur son mariage* ou come in here.

(2) This Section in L. and M. stands the last in the Chapter of Villenage.

“ A PAIER

“*A PAIER un fine pur le mariage, &c.*” [q] And this villeine and servile tenure is called in old bookes *marchetum* or *merchet*. *Marchetum verò pro filiâ dare non competit libero homini, inter alia, propter liberi sanguinis privilegium, &c.* And this is true *de communi jure, sed modus et conventio vincunt legem.* And as Littleton here saith, it is the folly of such a freeman to take such mannors, lands or tenements, to hold of the lord by such bondage. And yet this doth not make such a freeman a villeine, [r] *Quia hujusmodi præstationes fiunt ratione tenementi, et non ratione personæ in donatione comprehensæ et reservatæ; non enim unum et idem est, sed longè aliud, tenere liberè, et per liberum servitium, &c.* For the signification of this word, *vide* Sect. 194. 74. 441.

[q] 15. E. 3. tit. Aid 33. Bracton, lib. 2. fo. 26. Mirror, ca. 2. sect. 18. See more of this after in this Chapter, Sect. 194. (Dr. & Stud. 66. b.) [r] Fleta, lib. 3. cap. 13. Mir. cap. 2. sect. 18.

Sect. 175.

ITEM, chescun villeine ou est un villeine per title de prescription, c'estascavoir, que il et ses auncestors ont este villeins de temps dont memorie ne curt; ou il est villeine per son confession demesne en court de record.

ALSO, every villeine is either a villeine by title of prescription, to wit, that hee and his ancestors have been villeines time out of mind of man; or he is a villeine by his owne confession in a court of record.

“*C HESCUN villeine ou est villeine per title de prescription, &c.*” Every villeine is, either by prescription, or confession. *Servi aut nascuntur, aut fiunt.* By prescription, either regardant to a manor, &c. or in grosse. In gross, either by prescription, or by granting away a villeine that is regardant, or by confession. [f] *Fit etiam servus liber homo per confessionem in curiâ regis factâ* (3).

(2. Ro. Abr. 732.) Lib. Rub. cap. 76, 77. Bracton, lib. 1. cap. 6. Bract. fol. 77. (Post. 120. a.)

[f] Bract. lib. 1. cap. 6. Fleta, lib. 1. ca. 3. 8. Aff. p. 13. 11. Aff. 12. 24. Aff. 1. 73. Aff. 1. 17. E. 3. 78, 79. 27. E. 3. 89. 18. E. 4. 25. 27. H. 8. 7. b. Le statute de 17. E. 3. 17.

“*En court de record.*” Record is derived of the *Latine* word *recordor*, that is, to keepe in minde, as the poet saith, *Si ritè audita recordor.* And therefore a record or inolment is a memoriall or monument of so high a nature, [t] as it importeth in it selfe such an absolute verity, as if it be pleaded (4) that there is no such record, it shall not receive any triall by witnesse, jury, or otherwise, but only by it selfe. [u] And every court of record is the king's court, albeit another may have the profit, wherein if the judges do erre, a writ of error doth lye. [x] But the county court, the hundred court, the court baron, and such like, are no courts of record; and therefore the proceedings therein may be denyed, and tryed by jury, and upon their judgements a writ of error lyeth not, but a writ of false judgement, for that they are no courts of record, because they cannot hold plea of debt or trespassse, if the debt or damages doe amount to forty shillings, or of any trespassse *vi et armis* (1).

[t] 17. E. 3. 23. 11. H. 4. 26. 37. H. 6. 21. Dier Mich. 7. & 8. Eliz. 242. Pl. Com. 79, &c. [u] Glanvil. lib. 9. cap. 8. Bracton, lib. 3. fo. 156. Britt. fo. 121. [x] 6. Co. 11. & 12. in Gentleman's case. (3. Inst. 71. F. N. B. 138. Post. 128. 260. a. 4. Co. 71. a. 8. Co. 38. 1. Ro. Abr. 527. 2. Ro. Abr. 862. 863. Plow.

Monumenta, quæ nos recorda vocamus, sunt veritatis et vetustatis vestigia.

491. b. 1. Sid. 94. 2. Ro. Abr. 573. 576. 1. Sid. 314. (14 H. 8. 15. 1. Rol. Abr. 543.)

(3) [See Note 163.]

[118. a.]

(4) [See Note 164.]

(1) See post. 260. a.

Sect. 176.

MES si frank home ad divers issues, et puis il confesse luy meme d'estre vilain a un auter en court de record; uncore les issues que il avera devant le confession sont franks, mes les issues que il avera apres le confession seront villeines.

BUT if a freeman hath divers issues, and afterwards he confelleth himselfe to be a villaine to another in a court of record; yet those issues which he hath before the confession are free, but the issues which he shall have after the confession shall be villaines.

This is so evident as it needeth no explication.

Sect. 177.

ITEM, si le vilain purchase terre, et alien la terre a un auter devant que le seignior enter, donques le seignior ne poit enter; car il serra adjudge son folle, que il n'entra pas, quant la terre fuit en le maine le vilain. Et issint est dez biens. Si le villeine achate biens, et eux vend ou done a un auter, devant que le seignior seisisst les biens, adonques le seignior ne poit eux seiser. Mes si le seignior, devant ascun tiel vender ou done, vient deins la ville la lou tielx biens sont, et la, overtment enter les vicines, claima les biens, et seisisst parcel des biens, en nosme de seisin de tous les biens que le villeine ad ou aver poit (1), &c. ceo est dit bon seisin en ley; et le occupation que le villeine ad apres tiel claima en les biens, (2) serra pris en le droit le seignior.

ALSO, if a villaine purchase land, and alien the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villaine. And so it is of goods. If the villaine buy goods, and sell or give them to another, before the lord seisseth them, then the lord may not seise the same. But if the lord, before any such sale or gift, commeth into the towne, where such goods be, and there, openly amongst the neighbors, claime the goods, and seise part of the goods, in the name of seisin of all the goods which the villaine has or may have, &c. this is a good seisin in law, and the occupation which the villaine hath after such clayme in the goods, shall be taken in the right of the lord.

(Dr. & Stud.
140. 2. Rol.
Abr. 735.)

IN this case before the lord doth enter, hee hath neither *jus in re nec jus ad rem*, but onely a possibilitie of an estate, which estate he must gaine by his entry; and therefore if the villaine doth by way of prevention alien before the lord doth enter, the lord is barred of the

(1) The words *que le vilain ad ou aver poit* not in L. and M. nor Roh.

(2) Instead of *les biens*, it is *ley* in L. and M. and Roh.

the possibility, which he had to the land, for ever. [a] *Si autem servus vendiderit feodum, quod sibi et hæredibus perquisiverit, antequam dominus seisinam inde ceperit, valet donatio, et dominus sibi ipsi imputet, quod tantum expectavit.* But [b] if the villaine of the king purchaseth land, and alieneth before the king (upon an office found for him) doth enter, yet the king after office found shall have the land; *quia nullum tempus occurrit regi*, as Littleton himselfe saith in the next Section (2). And yet, after office found, the king shall not have the meane profits; because the title is by the seisure.

[a] Fleta, lib. 3. ca. 13. Britton, fol. 98. a. 19. E. 2. Dower 17. [b] 35. E. 3. tit. Villenage 22. 9. H. 6. 21. per Babington. 12. H. 7. 12. (8. Co. 170. 7. Co. 28. 2. Ro. Abr. 734.)

18. b.] “Purchase terre.” The like law is of seignories, advowsons, reversions, remainders, rents, commons certaine, and such like certaine inheritances, wherein the villaine hath any estate or interest. If the villaine purchase land either in fee simple, fee taile, or for life, if the villaine doth alien before the lord doth enter, hee doth prevent the lord. But yet the issue of the villaine shall recover the land entailed in a formedon, and then the lord may enter.

“Alien la terre.” Alien commeth of the verbe *alienare*, *id est, alienum facere, vel ex nostro dominio in alienum transferre, sive rem aliquam in dominium alterius transferre.* If a freeman hath issue, and afterward by confession becommeth bond, and purchaseth lands in fee, and, before the lord enter, he dieth seised, and the land descends to his issue which is free; in this case the lord shall not enter upon the heire, and yet this is a descent and no alienation. The like law it is, if the land so purchased by the villaine doth escheate to the lord of the fee before any entry made by the lord of the villaine: so as the act of the law, that is, the descent or escheat may as well prevent the lord of his entry, as the act of the party by alienation.

If a villaine be disseised before the lord doth enter, the lord may enter into the land in the name of the villaine, and thereby gaine the inheritance of the land; but if there be a descent cast, so as the entry of the villaine be taken away, then the villaine must recontinue the estate of the land by judgement and execution, before the lord of the villaine can enter. And this word [alien] doth not onely extend to alienations of land in deed, but also to alienations in law; as if the villeine purchase land and dyeth without heire, and the land escheate, or if there be a recovery against the villaine in a *cessavit*, or the like.

“Et issint est des biens, &c.” *Biens, bona*, includes all chattels, as well reall as personall. *Chattels* is a French word, and signifies goods, which by a word of art we call *catalla*. Now goods, or chattels, are either personall or reall. Personall, as horse and other beasts, householdstufte, bowes, weapons and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions. Reall, because they concerne the reality, as tearmes for years of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by *legit*, and such like.

(2. Ro. Abr. 732. 5. Co. 109. 2. Ro. Abr. 58. Cro. Eliz. 386.)

Bona dividuntur in mobilia et immobilia. Mobilia rursus dividuntur in ea, quæ se movent et quæ ab aliis moventur. But, by the common law, no estate of inheritance or freehold is comprehended under these words *bona* or *catalla* (3). And it is to be observed, that as the

(2) See post. 119. a.

[118. b.]

(3) See farther as to chattels, Bro. Abr.

tit. *Chattels*, Com. Dig. tit. *Biens* and *Affets*, and Vin. tit. *Executors*, U—Y—Z.

the title of the lord to his villeine's lands beginneth by his entry, so his title to the goods beginneth by the seifure of them. And here againe it is to be observed, that where our author, in this branch concerning goods, useth these words (sell or give) that the same extendeth as well to gifts in law, as gifts in deed. And therefore if a niese hath goods, and taketh baron, by this gift in law by force of the mariage, the lord is barred. And so it is if a villaine make his executors and dieth, by this gift in law the lord is barred, as shall be said hereafter.

3. H. 4. 15.

46. E. 3. Barre

217. Doct. and

Stud. cap. 43.

fol. 139.

22. E. 3. 6.

Baldwin Freuil's
case.

(Ante 88. Post.

145. b.)

[c] 18. H. 6.

23. b. per Af-
cough.

3. H. 4. 16.

46. E. 3. Barre

217.

" Et claime les biens, et seifist parcel des biens." For a claime onely of the goods of the villaine is not sufficient in law, but he must seife some part in the name of all the residue, as here it appeareth; or that the goods be within the view of the lord; for the claime and his view amount to a seifure, as the clayme of a ward being present by word is a sufficient seifure, albeit the gardian layeth no hands on him. See hereafter Sect. 321. And so note a diversity betweene a claime of lands or tenements and goods. [c] In an action of trespassse or detinue brought by the villaine, a release made to the defendant by the lord is a good barre; for that amounts to a seifure and grant. If the villaine doth buy goods and make his executors, and dieth before the lord doth seife them, the executors shall detain them against the lord of the villaine.

" Ad ou aver poit, &c." Here (&c.) doth imply an excellent point of learning, for that such a claime doth not only vest the goods, which the villaine then hath, but also which he after that shall acquire and get (4). But otherwise it is of lands of freehold or inheritance; for there such a generall entry or claime extends only to the lands the villaine hath at that time, and not to any other which he shall purchase after, as by our author in this Section may justly be collected.

[119. a.]

Sect. 178.

MES si le roy ad un villein, que purchase terre, et alien devant que le roy entra; uncore le roy poit enter, en que maines que la terre deviendra. Ou si le villein achata biens, et eux vendist devant que le roy seifist les biens; uncore le roy poit seifer les biens, en que maines que les biens sont. Quia nullum tempus occurrit regi.

BUT if the king hath a villeine, who purchases land, and alien it before the king enter; yet the king may enter, into whose hands soever the land shal come. Or if the villeine buyeth goods, and sell them before that the king seifeth them; yet the king may seife these goods, in whose hands soever they be. Because *nullum tempus occurrit regi* (1).

Vide Sect. 125.

Vide Stamford

Præf. f. 32. c.

" SI le roy ad villein, &c." This is evident upon that which hath beene said before.

" Ou

(4) *Contra*, as to the goods afterwards acquired, Dr. and Stud. vol. 2. chap. 4.

[119. a.]

(1) [See Note 165.]

"*Ou si tiel villeine achata biens, &c.*" If the king's villeine acquire any goods or chattels, the propertie of them is in the king before any seifure or office; and it is well said of an ancient author.

[d] *Al roy, quant al droit de la corone ou a franch estate, ne poet nul temps occurre;* and another [e] speaking in the person of the king saith, *Nul temps n'est limit quant a mes droits.*

35. E. 3. tit. Villenage. 22.
[d] Mirror, c. p. 3.
[e] Britton, fol. 88. Bract. lib. 1. quæ res dari possint.

Sect. 179.

ITEM, si home lessa certaine terre a un auter pur terme de vie, servant le reversion a luy, et un villein purchase del lessor le reversion; en cest cas il semble, que le seignior del villeine poit maintenant vener a la terre, et claime le reversion come le seignior le dit villeine, et per cel claime le reversion est maintenant en luy. Car en auter forme il ne poit vener a le reversion. Car il ne poit enter sur le tenant a terme de vie. Et s'il doit demurrer tanque apres le mort le tenant a terme de vie, donques per cas il viendra trope tarde. Car peraventure le villeine voile grantor ou alier le reversion a un auter en le vie le tenant a terme de vie, &c.

ALSO, if a man let certaine land to another for terme of life, saving to himself the reversion, and a villeine purchase of the lessor the reversion; in this case it seemeth, that the lord of the villeine may presently come to the land, and claime the reversion as the lord of the said villeine, and by this claime the reversion is forthwith in him. For in other forme or manner he cannot come to the reversion. For he cannot enter upon the tenant for life. And if he should stay untill after the death of the tenant for life, then perchance he should come too late. For peradventure the villeine will grant or alien the reversion to another in the life of the tenant for life, &c.

"**P**UIT maintenant vener a la terre."

For he cannot claime the reversion but upon the land, and he by his comming upon the land for that purpose is no trespassor; because the law giveth him power to claim the reversion, lest he should be prevented, and claime he cannot, unless he commeth to the land. So likewise if the villeine purchase a feigniorie, rent, common, or any other freehold or inheritance, out of any lands or tenements of another, the lord may lawfully come to the land to make his claime to the feigniorie, rent, or other profit out of the land. But if the villeine purchase a feigniorie, or a rent, common, or other inheritance issuing out of the land of the lord himselfe, it is said, that the feigniorie, rent, common, or such other inheritance, is extinguished in the lord's possession without any claime.

Vide 41. E. 3. tit. Audita quærela 18.
12. H. 4. tit. Execution 28.
F. N. B. 104.
1. H. 7. 15. b.

"Grant." Here must be intended an attornment; for after the grant and before attornment the lord may not (1) claime the reversion (2).

"En

(1) This is apparently an error of the press, the sense requiring the omission of *not*. Accordingly the first edition is without it.

But the error appears in all the subsequent editions.

(2) [See Note 166.]

“ *En la vie del tenant pur vie, &c.*” Here by (&c.) is included tenant in taile, tenant *pur auter vie*, tenant by statute merchant, staple, *elegit*, and for yeares; for during all these estates the lord may claime the reversion, as well as in case of the tenant for life.

Sect. 180.

EN mesme le maner est, leu un vil-
lein purchase un advowson d'un
esglise plein d'un incumbent, le seignior
del villein poit vener al dit esglise, et
claime le dit advowson, et per cel claime
l'advowson est en luy. Car s'il doit at-
tendre tanque apres le mort l'incumbent,
et adonque a presenter son clerke a le dit
esglise, donque, en le meane temps, le
villeine poit alier le advowson (3), et
issint ouster le seignior de son present-
ment.

IN the same manner it is, where a
villeine purchases an advowson of
a church full of an incumbent, the
lord of the villeine may come to the
said church, and claime the said ad-
vowson, and by this claime the ad-
vowson is in him. For if he will at-
tend till after the death of the incum-
bent, and then to present his clarke to
the said church, then, in the mean
time, the villein may alien the advow-
son, and so oust the lord of his pre-
sentment.

33. H. 14 b.

Fleta, lib. 5.
cap. 14.

24. E. 3. 30.

25. E. 3. 47.

33. E. 3. 9.

44. E. 3. 3.

9. H. 6. 31.

“ **ADVOWSON,**” *Advocatio*, so called, because the right of
presenting to the church was first gained by such as were
found rs, benefactors, or maintainers of the church; viz. *ratione*
foundationis, as where the ancestor was founder of the church; or *ra-*
tione donationis, where he endowed the church; or *ratione fundi*, as
where he gave the soile, whereupon the church was built. And
therefore they were called *advocati*. They were also called *patroni*,
and thereupon the advowson is called *jus patronatus*. And in one
word, advowson of a church is the right of presentation or colla-
tion to the church. *Advocatus est ad quem pertinet jus advocacionis,*
alicujus ecclesie, ad ecclesiam nomine proprio, non alieno, possit præsenta-
re. Every church is either presentative, collative, donative, or
elective. *Vide* Section 645. 648.

“ *Plein d'un incumbent.*” If the church be presentative, the
church is full by admission and institution against any common per-
son; but against the king it is not full untill induction.

22. H. 6. 27. 21. E. 4. 34. b. *Vide* Sect. 648. (Post. 344. a.)

“ *Incumbent*” commeth from the verbe *incumbo*, that is, to be di-
ligently resident, *id est, obnixè operam dare*; and when it is written
incumbent, it is falsely written, for it ought to be *incumbent*, as
Littleton doth here (4). And therefore the law doth intend him to
be resident on his benefice.

10. H. 6. 7.

“ *Le seignior del villeine poit vener al esglise, et claime le dit ad-*
vowson” Note, albeit the advowson is a thing incorporeall, and
not visible, yet because the principall duty of the presentee of the
patron

[120. 2.]

(3) &c. L. & M.

(4) However, in L. and M. and Roh. the word is *encombert*.

patron is to be done in the church, the claime of the lord of the villeine must be made there; and by that claime the inheritance of the advowson shall be vested in the lord; for every claime or demand to devest any estate or interest must be made in that place which is most most apt for that purpose.

“*Après la mort del incumbent.*” *Nota*, a church presentative may become void five manner of wayes, viz. 1. By death, whereof *Littleton* here speaketh. 2. By creation. 3. By resignation. 4. By deprivation. 5. By cession, as by taking a benefice incompatible.

Doct. & Stud.
lib. 2. ca. 31.
5. E. 3. 180.
10 E. 3. 482.
25. E. 3. 49.
9. E. 3. 462.

11. H. 4. 37. 59. & 76. 41. E. 3. 5. F. N. B. 31, 32.

“*Et donques a presenter son clerke al dit eglise, &c.*” A presentation is derived à *præsentando*; quia *præsentare nihil aliud est quam præsto dare, seu offerre*. And *Littleton* here briefly expresth the effect of a presentation; for it is the act of the patron offering his clerke to the bishop of that diocese, to be instituted to such a church, in these or the like words directed to the bishop, *Præsto vobis A. B. clericum meum ad ecclesiam de Dale, &c.* This may be done as well by word, as by writing; and if it be by writing it is no deed, for the presentation is of the clerke, and the direction to the bishop, so as this writing is in nature of a letter to the bishop: and this is the reason that the king himselfe may present by word, as elsewhere is said. A villein at this day purchaseth an advowson in fee, the church becomes voide, the lord for one hundred pound given by *A. B.* clerke presents him to the church, and his clerke is admitted, instituted, and inducted; yet this gaineth not the advowson to the lord [d]. And so it is in that case, if any on the behalfe of *A. B.* had given or contracted with the lord in consideration of any valuable thing to present *A. B.* to the said church, albeit it had beene without the consent or knowledge of *A. B.* yet it should not have vested the advowson in the lord. But this was not law when *Littleton* wrote. [e] But now by the statute of 31. *Eliz.* the presentation, admission, institution, and induction in both the said cases, and in the like are made voide (1), where before the said statute they were but voidable by deprivation (2). And if a man present by usurpation to a benefice, by reason of any corrupt contract, agreement, &c. that presentation and the institution and induction thereupon are void; for that act extends to all patrons as well by wrong as by right. But where any presents by usurpation, the rightfull patron, and not the king, shall present; for otherwise every rightfull patron may lose his presentation. And such an incumbent, that commeth in by reason of any such corrupt agreement, is so absolutely disabled for ever after to be presented to that church, as the king himselfe, to whom the law giveth the title of presentation in that case, cannot present him againe to that church; for the act, being made for suppression of symony and such corrupt agreements, so bindes the king in that case, as he cannot present him that the law hath disabled (3); for the words of the act be, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same bene-

(2. Ro. Abr. 353.)
[d] Adjudge in communi banco Mich. 41. & 42. Eliz. inter Baker & Rogers.
[e] Adjudged in the King's Bench, Mich. 13. Ja in a quar. imp. brought by the king against the bishop of Norwich, Thomas Cole, and Robert Secker clerke, for the vicarage of Haverell in Suffolk.
(Cro. Jam. 385. Hob. 5. Hob. 165. 12. Co. 100. 73. 3. Inst. 153. 1. Ro Abr. 370. Cro. Jam 385. 533. Cro. Cha. 477. Cro. Cha. 331.)
fice.

7. Co. 32. Post. 234. 11. Co. 68. Cro. Cha. 331.)

(1) [See Note 167.]
(2) [See Note 168.]

(3) [See Note 169.]

[f] Pl. Com.
502. 27. H. 8.
2. H. 7. 6.
11. H. 7. 11.
13. H. 7. 8. b.
11. H. 4. 76.
5. E. 3. 29.
F. N. B. 211. E.

ficē. [f] And the party being disabled by the act of parliament (which being an absolute and direct law) cannot be dispensed withall by any grant, &c. with a *non obstante*; as it may be, when any thing is prohibited *sub modo*, as upon a penalty given to the king (4). And the said act doth not only extend to benefices with cure, but to dignities, prebends, and all other ecclesiastical livings.

4. H. 4. ca. 12.

“*Clerke*,” *Clericus*, is twofold: *ecclesiasticus* (which *Littleton* here intendeth), and he is either secular or regular, so called because he is *servus et hæreditas domini*: and *laicus*, and in this sense is signified a pen-man, who getteth his living in some court or otherwise by the use of his pen.

(Ante 117. a.)

[g] 14. H. 4. 12.
38. E. 3. 35.
13. E. 3. quare
imp. 57.

[b] 43. E. 3. 10.
39 E. 3. 5.

4. H. 6. 5. (Post. 351. a. 1. Ro. Abr. 345.)

Note, if the church becommeth void, albeit the present avoidance be not by law grantable over, yet may the lord of the villeine present in his owne name, and thereby gaine the inheritance of the advowson to him and his heires; for albeit it be not grantable over, yet it is not meerly a chose in action; [g] for if a feme covert be seised of an advowson, and the church becommeth void, and the wife dyeth, the husband shall present to the advowson; [b] but otherwise it is of a bond made to the wife; because that is meerly in action.

Sect. 181.

ITEM, il y ad villeine regardant, et villeine en gros. Villein regardant est, sicome home est seisie d'un mannor a que un villein est regardant, et celui que est seisie del dit mannor, ou ceux que estate il ad en mesme le mannor, ount este seisies de le dit villein et de ses auncestors come villeins et niefs (1) regardants a mesme le mannor de temps dont memorie ne curt. Et villeine en grosse est, lou un home seisie d'un mannor a que un villeine est regardant, et il graunt mesme le villein per son fait a un autre, donques il est villein en grosse, et nemy regardant.

H. 7. 5.

Bract. li. 2. fo. 26.
Mir. ca. 2. sect.
18.

AL SO, there is a villeine regardant, and a villeine in grosse. [120. b.] A villein regardant is, as if a man be seised of a mannor to which a villein is regardant, and he which is seised of the said mannor, or they whose estate he hath in the same mannor, have beene seised of the villein and of his ancestors as villeins and niefs regardant to the same mannor time out of memory of man. And villein in grosse is, where a man is seised of a mannor wherunto a villein is regardant, and granteth the same villein by his deed to another, then he is a villein in grosse, and not regardant,

“*VILLEIN regardant*.” He is called regardant to the manour, because he hath the charge to do all base or villenous services within the same, and to gard and keep the same from all filthie or loathsome things that might annoy it: and his service is not certaine, but he must have regard to that which is commanded unto him. And thereupon he is called regardant, *a quo præstandum servitium incertum et indeterminatum, ubi scire non poterit vespere quale servitium*

[120. b.]

(4) [See Note 170.]

(1) & niefs not in L. and M.

servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit, as before hath beene observed. And Littleton sayth, hereafter, that no other thing is said to be regardant, but onely a villeine: [i] yet in old bookes it was sometimes applyed to services. Vide Sect. 84.
[i] 20. E. 3. tit. Issue 30.

“*In grosse*,” is that which belongs to the person of the lord, and belongeth not to any mannor, lands, &c.

Sect. 182.

ITEM, *si un home et ses ancestors, que heire il est, ont este seises d'un villeine et de ses ancestors come des villeins en grosse de temps dont memorie ne curt, tiels sont villeines en grosse.*

ALSO, if a man and his ancestours, whose heire he is, have beene seised of a villeine and of his auncestors as of villeines in grosse time out of memorie of man, these are villeines in grosse.

THIS needeth no explanation, but to add the saying of an ancient author. *Servage de home est subjection, issuant de cy grand antiquite, que nul franke cep poet estre trove per humane remembrance.* Mir. ca. 2. sect. 18.

Sect. 183.

ET hic nota, *que tiels choses, que ne poient estre grants, ne alienees, sans fait ou fine, home que voile aver tiels choses per prescription, ne poet auterment prescriber forsque en luy et en ses auncestors, que heire il est, et nemy per ceux parols, En luy et en ceux que estate il ad; pur ceo que il ne poet aver lour estate sans fait ou auter escripture, le quel covient d'estre monstre a le court, si il voile aver ascun advantage de ceo. Et pur ceo que le grant et alienation d'un villeine en gros (3) ne gist sans fait, ou autre escripture, home ne poit prescriber en un villein en gros, sans monstrans d'escripture, sinon en soy mesme que claime le villeine, et en ses ancestors que heire il est. Mes de tiels choses, que sont regardants ou appendants a un mannor, ou a auters terres et tenements, home poet prescriber, que il et ceux que estate il ad, queux fueront seises de le mannor, ou de tiels terres et tenements,*

AND heere note, that such things, which cannot be granted, nor aliened, without deed or fine, a man which will have such things by prescription, cannot otherwise prescribe, but in him and in his auncestors, whose heire he is, and not by these words, In him and them whose estate he hath; for that he cannot have their estate without deed or other writing, the which ought to be shewed to the court, if he will take any advantage of it. And because the grant and alienation of a villeine in grosse lyeth not without deed, or other writing, a man cannot prescribe in a villein in grosse, without shewing forth a writing, but in himselfe which claims the villeine, and in his auncestours whose heire he is. But of such things, which are regardant or appending to a manour, or to other lands and tenements, a man may prescribe,

(3) *en gros* not in L. and M. nor Roh.

tenements, &c. ont este seises de tiels choses come regardants ou appendants a le mannor, ou a tiels terres et tenements (4) de temps dont memorie, &c. (5) Et la cause est pur ceo que tiel manor, ou terres et (1) † tenements poient passer per alienation sans fait, &c.

scribe, that he and they whose estate he hath, who were seised of the manor, or of such lands and tenements, &c. have been seised of those things, as regardant or appendant to the manor, or to such lands and tenements time out of mind of man. And the reason is, for that such manor or lands and tenements may passe by alienation without deed, &c.

Vid. Sect. 441.

194. 174. 74.

[l] Bract. li. 5.

tract. 5. c. 28.

(Poit. 262. a.)

[m] Glanv. li. 8.

ca. 1.

[n] 9. Co. cap. 3.

Statut. de modo

levandi fines. Pl.

“OU fine,” in Latine, finis, [l] Ideo dicitur finalis concordia, quia imponit finem litibus, et est exceptio peremptoria. [m] Finis est amicabile compositio et finalis concordia, ex consensu et licentiâ domini regis, vel ejus justiciariorum (1). [n] Talis concordia finalis dicitur, eo quod finem imponit negotio, adeo ut neutra pars litigantium ab eo de cætero poterit recedere (2). Of the severall parts of a fine, and many incidents to the same, you shall reade in my Reports.

Com. 357. (3. Co. 84. 8. Co. 51.) 5. Co. fol. 38. Teye's case.

[o] 22. Aff. 53.

23. Aff. 6.

12. H. 7. 16. 18.

(Doct. Pla. 302,

303, 304.)

[p] 39. H. 6. 8.

18. E. 4. 23.

[q] 11. H. 4. 89.

19. R. 2. Ac-

tion sur le case 51.

13. E. 3. Br. 674.

(Cro. Jam. 673.

10. Co. 59. b.)

[r] 9. E. 4. 3. b.

29. Aff. 19.

2. H. 6. 10.

48. E. 3. tit. 33.

3. H. 6. 28.

(Bio. Que estate

3.)

[s] 41. Aff. 2.

40. Aff. 28.

2. H. 4. 20.

27. H. 6. 3.

“Que estate, &c.” Quorum statum, as much as to say, whose estate he hath. Here Littleton declareth one excellent rule, [o] that a man cannot prescribe in any thing by a *que estate*, that lyeth in grant, and cannot passe without deed or fine; but in him and his ancestors he may, because he comes in by descent without any conveyance. Neither can a man plead a *que estate* in himselfe of any thing that cannot passe without deed; [p] but in another he may, as in barre of an avowry, the plaintife may plead a *que estate* in the seigniory in the avowant. But Littleton's words are to be observed, (*home que voile aver tiels choses per prescription*). Therefore [q] when a thing that lyeth in grant, is but a conveyance to the thing claimed by prescription, there a *que estate* may be alledged of a thing that lyeth in grant; as a man may prescribe, that he and his ancestors, and all those whose estate he hath in an hundred, have time out of minde, &c. had a leet, &c. this is good, &c.

[r] Regularly the plaintife shall not intitle him by a *que estate*, but he must shew how he came by it; but after avowry made, the plaintife shall plead a *que estate*, because he is now become as a defendant.

[s] A man may plead a *que estate* of a tenancy in taile, or of an estate for life, so as he averreth the life of them; but he cannot plead a *que estate* of a lease for yeares (6), or at will.

15. E. 4. 1. 5. H. 7. 39. 18. E. 4. 10. 7. E. 6. tit. Que estate Br. 31.

7. El. Dyer 238. (1. Co. 46. 1. Sid. 298. Doc. Plac. 304.)

[t] 22. H. 6. 34.

6. E. 4. 12.

31. H. 8. Que

estate Br. 48.

[t] A disseisor, abatour, intruder, recoveror, or any other that cometh in the *post* shall plead a *que estate*. [121. b.]

39. H. 6. 14. 9. H. 6. Estop. 25.

A *que*

(1) [See Note 171.]

(2) [See Note 172.]

(4) &c. in L. and M. and Rob.

(5) court instead of &c. in L. and M. and

Rob.

(6) But see 1. Lev. 100. and 1. Sid. 298.

(1) † *on* instead of *et* in L. and M.

[u] A *que estate* must be alledged in the tenant or defendant himselfe, and not in one in the meane conveyance, from whom he claimeth; and yet some bookes be to the contrary.

estate 8.

1. E. 6. *Que estate* Br. 49.

(Cro. Cha. 54.

[u] 11. H. 4. 81.
27. H. 6. 32.
9. E. 4. 3.
2. E. 6. tit. *Que*
1. Lev. 190.)

“ *Le quel convient d'estre monstre al court.*” The reason wherefore a deed, that is pleaded, ought to be shewed to the court is, because every deed must prove itselfe to have sufficient words in law, whereof the court must adjudge: and also to be proved by others, as by witnesses or other prooffe, if the deed be denied, which is matter of fact.

“ *Per alienation sauns fait, &c.*” Here by (&c.) is implied, that whatsoever passeth by livery of seisin, either in deed or in law, may passe without deed; and not only the rents and services parcell of the mannor shall with the demeanes, as the more principall and worthy, passe by livery without deed, but all things regardant, appendant, and appurtenant to the mannor, as incidents or adjuncts to the same, shall, together with the mannor, passe without deed; all which, as here it appeareth, and elsewhere is said, shall passe, without saying *cum pertinentiis* (2).

Sect. 184.

ET est asçavoir, que nul chose est nosme regardant a un mannor, &c. forsque villeine. Mes certaine auters choses come advowson et common de pasture, &c. sont nosmes appendants al mannor ou al terres et (3) tenements, &c.

AND it is to be understood, that nothing is named regardant to a mannor, &c. but a villeine. But certaine other things, as an advowson and common of pasture, &c. are named appendant to the mannor, or to the lands and tenements, &c.

“ *REGARDANT:*” Vide Sect. 181.

“ *Appendants.*” Appendant is any inheritance belonging to another, that is superior or more worthy. In law it is called *pertinens, quasi invicem tenens*, holding one another; a word indifferent both to things appendant, and things appurtenant. The quality and nature of the things do make the difference. But regardant (as our author saith) is only applyed to a villeine. (*) Appendants are ever by prescription (4); but appurtenants may be created in some cases at this day. (5) As if a man at this day grant to a man and his heires common in such a moore for his beasts leavant or couchant upon his mannor; or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent within his mannor; by these grants these commons are appurtenant to the mannor, and shall passe by the grant thereof. In the civill law it is called *adjunctum* (6).

Vide Sect. 1.
(*) 5. Aff. 9.
8. H. 7. 4. 5.
28. H. 8.
Dier 30. b.
Pl. Com. 381.
F. N. B. fol. 181.
(2. Ro. Abr. 60.
5. Co. 17. b.)

If

(2) [See Note 173.]

(3) *ou* for *et* in L. and M.

(4) See note 2. to 122. 2.

(5) Acc. 1 Ventr. 407.

(6) [See Note 174.]

[x] 43. Aff. p.
10. 43. E. 3. 22.
(10. Co. 64, 65.
2. Ro. Abr. 125.)

[x] If *A.* be seised of a mannor, whereunto the franchise of waife and stray and such like are appendant, and the king purchaseth the mannor with the appurtenances, now are the royall franchises reunited to the crowne, and not appendant to the mannor. But if he grant the mannor in as large and ample manner as *A.* had, &c. it is said, that the franchises shall be appendant (or rather appurtenant) to the mannor.

Concerning things appendant and appurtenant, two things are implied [y].

[y] Hill and
Grange's case,
Pl. Com. 163.

First, that prescription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unlesse the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall (7). But things incorporeall which lye in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeall, as a mannor house or lands; or things corporeall to things incorporeall, as lands to an office.

(7. Rol. Abr.
230.)
[z] 1. H. 7. 24.
Pl. Com. 169.
[a] 5. Aff. 9.
(1. Sid. 354.)
[b] 10. E. 3. 5.
37. H. 6. 34.
26. H. 8. 4.
4. Co. 36, 37.
in Tittingham's
case.

[z] But yet (as hath been said) they must agree in nature and quality; for [a] common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there. [b] Nor a leet, that is temporall, to a church or chappell, which is ecclesiasticall. Neither can a nobleman, esquire, &c. claime a seat in a church by prescription as appendant or belonging to land, but to a house, for that such a seat belongeth to the house in respect of the inhabitancy thereof; and therefore, if the house be part of a mannor, yet in that case he may claime the seat as appendant to the house for the reason aforesaid.

[122. a.]

(12. Co. 104.)
5. E. 6. Diet.
70 b.
(1. Rol. Abr.
230.)

Secondly, that nothing can be properly appendant or appurtenant to any thing, unlesse the principall or superior thing be of perpetuall subsistence and continuance. For example, an advowson that is said to be appendant to a mannor, is *in rei veritate* appendant to the demesnes of the mannor, which are of perpetuall subsistence and continuance, and not to rents or services, which are subject to extinguishment and destruction (1).

(1. Rol. Abr.
230.)

An advowson is appendant to the mannor of *Dale*, of which mannor the mannor of *Sale* is holden, the mannor of *Sale* is made parcel of the mannor of *Dale* by way of escheat, the advowson is only appendant to the mannor of *Dale*.

31. H. 6. 15. l.

And where it is said, that a chamber may be parcell of a corody, and passe by the name of the corody, which may be extinguished, there he that hath the corody, hath but his habitation in the chamber; as a fellow of *Trinity* colledge in *Cambridge* hath in his chamber, or as one that had a corody and a chamber in a house of religion, he had but his habitation only. As for offices of fee whereunto land may appertain, they are of perpetuall subsistence, either being *in esse*, or in that they are grantable over.

13. E. 2. Quar.
imp. 170.
43. E. 3. 35.
13. E. 3. Quar.
imp. 58.
17. E. 3. 38.
5. H. 2. Diet. 259.
7. E. 3. 20.

Note, that an advowson at one turne may be appendant, and at another turne in grosse. As if the mannor be divided betweene coparceners, and every one hath a part of the mannor without saying any thing of the advowson appendant, the advowson remains in coparcenary, and yet, in every of their turnes, it is appendant to that part which they have; and so it is, if they make composition to present

[122. a.]

(7) [See Note 175.]

(1) [See Note 176.]

present against common right, yet it remains appendant. But if upon such a partition an expresse exception be made of the advowson, then the advowson remains in coparcenarie and in grosse, and so are the bookes reconciled.

“*Common de pasture.*” [c] *Communia*, it cometh of the *English* word common, because it is common to many; and thereupon and accordingly is here called by *Littleton* common of pasture, for that the feeding of beasts in the land wherein the common is to be had belongs to many.

Fleta, lib. 4. ca. 19. Mirror, ca. 5. sect. 3.

[d] There be foure kinds of common of pasture, viz. common appendant, which is of common right, (and therefore a man need not prescribe for it) (2) for beasts commonable (that is) that serve for the maintenance of the plough, as horses and oxen to plough the land, and for kine and sheepe to compester the land, and is appendant to arrable land (3).

[e] The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. [f] If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant; and for common appurtenant one must prescribe (4).

[g] The third is *common per cause de vicinage*, which differeth from both the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity; in which case one may inclose against the other, though it hath beene so used time out of mind, for that it is but an excuse for trespassse.

The last is common in grosse, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of common appendant, appurtenant, and in grosse, some be certaine, that is, for a certaine number of beasts; some certaine by consequent, viz. for such as be levant and couchant upon the land; and some be more incertaine, as commons *sauns number* in grosse, and yet the tenant of the land must common or feed there also (5).

There be also [b] divers other commons, as of estovers, of turbary, of pischary, of digging for coles, minerals, and the like. [i] If common appendant be claymed to a mannor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheate, the lord shall not encrease his common by reason of that. [k] If a man claime by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custome against the law, to exclude the owner of the soyle; for it is against the nature of this word common, and it was implied in the first grant, that the owner of the soyle should take his reason-

able

(2) [See Note 177.]

(3) See Fulb. Prepar. 68. b. and 1. Saund. 351.

(4) [See Note 178.]

(5) [See Note 179.]

19. E. 3. Quar. imp. 59.

35. H. 6. 32, 33.

38. H. 6. 9.

2. H. 7. 5.

(6. Co. 64. a.)

[c] Glanvill. lib.

3. ca. 36.

Bract. lib. 4.

c. 19. & 42.

Brit. cap. 55,

56, 57.

20. E. 3.

Admeasurement

8. Temps E. 1.

Common 24.

17. E. 2. ibid. 23

4. H. 6. 22. H. 6.

(1. Rol. Abr. 396.

Cro. Cha. 542.

6. Co. 69.)

[e] 37. H. 6. 34.

26. H. 8. 4.

F. N. B. 181.

(Dier 70. b.)

[f] 4. Co. f. 37,

38, &c. Tarring-

ham's case.

(Hob. 235.

1. Roll. Abr. 399.

Cro. Cha. 482.

Cro. El. 531.)

[g] 8. Co. 78, 79.

W. Wilde's case.

(7. Co. 5. Cor-

bet's case.)

(1. Saund. 345.)

[b] Fleta, ubi supra.

[i] 18. E. 3.

fol. 43.

[k] 15. E. 2.

Prescript. 51.

12. H. 8. fol. 2.

(Cro. Jam. 208.

257. 1. Ro.

Abr. 396.

2. Rol. Abr. 267.

7. Co. 5.

1. Vent. 391.

1. Saund. 351.)

[*] Pasch. 26. Eliz. in the King's Bench, inter White & Shirland in com. Oxon. Vide Sect. 1. & 2. (F. N. B. 180. c. 2. Saund. 326. 1. Rol. Abr. 405.) [1] Vid. 3. E. 3. 29. 30. 4. E. 3. 7. 46. E. 3. 23.

15. E. 2. Prescript. 51. [m] 20. H. 6. 4. 10. H. 7. 24. Temps E. 1. Assise 422. (2. Rol. Abr. 258.) [*] Inter Chinery & Fishen in le Com. Banke in replevin, & Mich. 29. & 30. Eliz. inter Shirland & White in com. Oxon. et inter Foiston & Crachrode eodem termino in Essex. (2. Rol. Abr. 267.)

[n] 19. H. 6. 33.

[o] Vide Sect. 541. (4. Co. 31. a. Post. 307. 349. b. 363. b.)

able profit there, as it hath beene adjudged. [*] [1] But a man may prescribe or alledge a custome to have and enjoy *solum vesturam terræ*, from such a day till such a day, and hereby the owner of the soyle shall be excluded to pasture or feed there (6); and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soyle from feeding there. *Nota diversitatem*. [m] So a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soyle shall not fish there; but if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soyle shall fish there (7). And all this hath beene resolved. [*] And therefore [122. b.] it is necessary for every man by learned advice to plead according to the truth of his case; for *parols font plea*.

[n] A man seised of land whereunto common is appendant, and is disseised, the disseisee cannot use the common, untill he entreth into the land whereunto it is appendant. [o] But if a man be disseised of a mannor whereunto an advowson is appendant, he may present unto the advowson, before he enters into the mannor; and the reason of this diversitie is, because in the case of the common it should be a prejudice to the tenant of the soile: for if the disseisee might do it, the disseisor also might put on his cattle, which should be a double charge to the tenant, but not so of the advowson.

Sect. 185.

ITEM, si home voile en court de record soy conufter d'estre villeine, que ne fuit villein adevant, tiel est villeine en grosse.

ALSO, if a man will acknowledge himselfe in a court of record to be a villeine, who was not a villein before, such a one is a villeine in grosse (1).

Bract. lib. 1. cap. 6. Britton, fol. 78. Fleta, l. 1. c. 3. 43. E. 3. 4. b. 19. E. 2. tit. Vil. 34. 18. E. 4. 29. [p] 19. H. 6. 32. 26. Aff. 62. 37. Aff. 17. 11. H. 4. 16. in appeale. (2. Ro. Abr. 732.) 41. E. 3. tit. Vill. 6.

THIS is intended in some action brought against him that made such confession, [p] or where he is brought into court by course of law; for if he commeth into the court extrajudicially, and not by any due course of law, such confession is without warrant of law, and bindeth not the partie, because the court had no warrant to take it. But if a *præcipe* be brought against one, he may confesse himselfe villeine to an estranger, and that he holds the land in villenage of him, and this is good and shall bind him. And if in that case the demandant reply, that he the day of his writ purchased was a freeman (2), and thereupon issue is taken, and he is tryed to be free, yet he shall remaine villeine to the stranger in respect of his confession.

19. H. 6. 32. b.

If a writ of *nativo habendo* be brought against one, and the plaintiffe, as he ought, offereth in his count to prove the villenage by the

cousins

[122. b.]

(6) [See Note 180.]

(1) See ante 117. b. n. 3.

(7) [See Note 181.]

(2) [See Note 182.]

cousins and kindred of the defendant, and thereupon produceth the uncles of the defendant, who upon examination confesse themselves to be villeines to the demandant; this confession, being entred of record, doth so bind, that, albeit if they were so free before, they and the heires of their bodies are by this confession bond and villeines for ever, for the uncles came in by due course of law in an action depending in court.

Sect. 186.

ITEM, *home que est villein est appelle villeine (3), et feme que est villein est appelle niese: sicome home que est utlage est dit utlage, et feme que est utlage est dit waive.*

AL SO, a man which is villeine is called a villeine, and a woman which is villein is called a niese: as a man which is outlawed is called outlawed, and a woman which is outlawed is called waived.

“**N**IEFE,” or *Naife*, is in *Latine naturalis, seu nativa*, because for the most part niefes are bond by nativitie.

“*Feme que est utlage est dit waive.*”

Waive, *wai-viata*, and not *utlagata* or *exlex*, for that women are not sworne in leets, or tornes, as men which be of the age of twelve yeares or more be; and therefore men may be called *utlagati*, *id est, extra legem positi*, but women are *wai-viatæ*, *id est, derelictæ*, left out or not regarded, because they were not sworne to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworne to the law, which is intended of the oath of allegiance in the leet (4).

And the outlawrie of a woman is legally called *wai-viaria mulieris*.

F N. B. 161. 2.
Regist. 132. &
277. Britton,
fol. 20.
Bract. 1. 3.
tract. 2. ca. 12,
13. Fleta, lib. 1
cap. 28. 3. H. 5.
tit. Utlawry
Statham.
Regist. orig. 132.
(2. Rol. Abr.
804.)

[123. a.]

Sect. 187.

ITEM, *si un villein prent frank feme a feme, et ad issue enter eux, l'issues ferront villeines. Mes si niese prent franke home a sa baron, lour issues ferra franke.*

AL SO, if a villeine taketh a free woman to wife, and have issue betweene them, the issues shall be villeines. But if a niese taketh a freeman to her husband, their issue shall be free.

* *Et c'est contrarie a le ley civil; car la est dit, partus sequitur ventrem* *
(1).

* This is contrarie to the civil law; for there it is said, *partus sequitur ventrem* *.

“**SURCULUS**

(3) *et nief* in L. & M. & Roh.

(4) See ante 68. b. n. 1, 2. to which add post. 172. b. Spelm. Gloss. voc. *Fidelitas*. 2. Inst. 73. Britt. cap. 29. Cow. Inst. 1. 2. t. 3. f. 14. Flet. 1. 2. c. 52. l. 3. c. 16. Mirr. c. 3. sect. 35. 7. Co. 6. b. 7. a. Calvin's case Tyr. Bibloth. Polit.

4th ed. 907. Ellefinere's argument in Calvin's case 76.

[123. a.]

(1) The sentence between the stars is not in L. and M. Roh. or P.

Fortescue, cap. 42. Glanv. lib. 5. cap. 6. Hil. 29. E. 1. coram rege Eborum in thesaur.

[q] Lib. Rub. cap. 77.

[r] Fortescue, ubi supra.

[s] Herewith agreeth Britton, fol. 78. b.

[t] Bract. lib. 4. fol. 298. b.

Idem, lib. 1.

cap. 6. Mirror, cap. 2. sect. 28.

[u] Bract. lib. 4. fo. 271.

[x] Glanvill. lib. 5. cap. 6.

Fortescue, cap. 42.

“**SURCULUS** totum alimentum à stipite capit, poma tamen edit sua.” The fiens (2) takes all his nourishment from the stocke, and yet it produceth his own fruit.

[q] *Si quis de ser-vo patre natus sit et matre liberâ, pro ser-vo reddatur occisus in eâ parte; quia semper à patre non à matre generationis ordo texitur. Si pater sit liber et mater ancilla, pro libero reddatur occisus.* [r] *Lex Angliæ nunquam matris, sed semper patris, conditionem imitari partum judicat.*

[s] The husband and wife are all one person in law, and the niese marrying a freeman is infranchised during the coverture (3); and therefore by the common law of England, the issue is free (4).

[t] *Si mulier ser-va copulata sit libero, &c. quòd partus habebit hæreditatem, et mater nullam dotem, quia mortuo viro suo libero redit in pristinum statum servitutis, nisi hæres ei dotem fecerit de gratiâ* (5). And when a bondman marieth a free woman, they are all one person in law, and *duæ animæ in carne unâ*, and *uxor subjecta est viro, et sub potestate viri* (6).

[u] *Observatur in com' Cornubiæ de tali consuetudine, quæ talis est, quòd si liber homo ducat nativam aliquam in uxorem ad liberum tene-mentum et liberum thorum, si ex eâ duæ procreantur filiæ, una erit libera et altera villana, quia ibi partiti sunt pueri inter liberum patrem et dominum uxoris villanæ.*

[x] *Qui verò procreantur ex nativâ unius et nativo alterius, proportionabiliter inter dominos sunt dividendi.*

“*Et ceo est contrarie al ley civil.*” (7) For true it is, that by that law *partus sequitur ventrem*, as well where a free man takes a bond woman to wife, as where a bondman takes a free woman to wife. In the first case the issue is by the civill law bond, and in the other free; both which cases are contrarie to the law of England. But this is no part of Littleton; and therefore we in this manner pass it over.

Sect. 188.

ITEM, nul bastard poit estre villein, si non que il voile soy conuser estre villeine en court de record; car il est en ley quasi nullius filius, pur ceo que il ne poit enheriter a nulluy.

ALSO, no bastard may be a villeine, unless he will acknowledge himselfe to be a villeine in a court of record; for he is in law quasi nullius filius, because he cannot be heire to any.

[a] Vide Sect. 399. 13. E. 1. tit. Villein 36. (Ante 3. b.)

Post. 244. b.)

[b] Bract. lib. 1. fo. 5. a. Fleta, lib. 1. cap. 3. Britton, fol. 78.

[c] 39. E. 3. 34.

“**NULLIUS** [a] filius.” *Cui pater est populus, pater est sibi nullus et omnis.*

Cui pater est populus, non habet ille patrem.

[b] Some hold that the bastard of a niese shall be a villeine.

[c] And others hold, that if a villeine hath a bastard by a woman, and after marieth the woman, that this bastard is a villeine. But the law is contrary in both cases; for in both cases, the issue by the

43. E. 3. 4. Britton, ubi supra.

common

(2) [See Note 183.]

(3) [See Note 184.]

(4) [See Note 185.]

(5) [See Note 186.]

(6) [See Note 187.]

(7) [See Note 188.]

common law is a bastard, and consequently, *quasi nullius filius*, as Littleton here saith. [d] Though a bastard be a reputed sonne, yet is he not such a sonne, in consideration whereof an use can be raysed, for the reason that Littleton here yeelds; because in judgement of law he is *nullius filius*. [e] (8) And, for the same reason, where the statute of 32. H. 8. of wills, speaketh of children, bastard children are not within that statute, and the bastard of a woman is no child within that statute, where the mother conveys lands unto him.

[f] It was found by verdict, that Henry the sonne of Beatrice, which was the wife of Robert Radwell deceased, was born *per undecim dies post ultimum tempus legitimum mulieribus constitutum*. And thereupon it was adjudged, *quod dictus Henricus dici non debet filius prædicti Roberti secundum legem et consuetudinem Angliæ constituti* (1). Now *legitimum tempus* in that case appointed by law at the furthest is nine moneths, or forty weeks (2); but she may be delivered before that time, which judgement I thought good to mention. And this agreeth with that in *Esāras: Vade et interroga pregnantem, si quando impleverit novem menses suos, adhuc poterit matrix ejus retinere partum in semetipsā? Et dixi, Non potest, domine*.

[d] 23. Eliz.
Dier 374.

[e] 13. Eliz.
Dier 296.
14. Eliz. Dier
313. 18. Eliz.
Dier 345.

[f] Trin. 18. E.
1. rot. 61. Bedf.
coram rege.
(Cro. Jam. 541.
1. Roll. Abr.
536. Godb. 281.
Palm. 9.)

4. Efdras 4. 41.
Vide Panciroll.
Nova Reporta,
page 485, &c.

Sect. 189.

ITEM, chescun villein est able et franke de fuer tous manners d'actions envers chescun person, forspris envers son seignior, a que il est villeine. Et uncore en certain choses il poit aver action envers son seignior. Car il poit aver envers son seignior un action d'appeal de mort son pere, ou d'auters de les auncesters, que heire il est.

ALSO, every villein is able and free to sue all manner of actions against everie person, except against his lord, to whom he is villeine. And yet in certaine things he may have against his lord an action. For he may have against his lord an action of appeale for the death of his father, or of his other ancestors, whose heire he is.

“**C**HESCUN villeine est able et franke de fuer, &c.” [g] In an action brought by a villeine *versus non dominum, non valet ei exceptio, quia est servus alienus, ex quo nihil ad ipsum utrum liber sit an servus*. [h] And it is to be observed, that he that hath but a particular estate in a villeine, as tenant for life or for yeares, shall disable the villeine, if he brings an action against him; but the lessor shall not (as it is said) disable him. [i] *Examinatio villenagii non tenet, nisi ex ore veri domini fuerit pronunciata*.

[g] Bract. lib. 4.
fol. 196.
Britton, cap. 49.
fo. 125.
[h] 14. E. 4. 6. b.
15. E. 4. 32.
20. E. 3. tit.
Villein 10.
38. E. 3. 21.
[i] Fleta, lib. 2.
cap. 4.
(3. Inst. 131.)

“**A**ppeale,” *Appellum*, commeth of the French word *appeller*, that signifieth to accuse or to appeach. An appeach, [k] an appeal, is an accusation of one upon another, with a purpose to attain him of felonie by words ordained for it.

[k] Brit. cap. 22.
fo. 38. Bracton,
lib. 1. fo. 6.

“**D**e mort.” [l] For a villeine shall not have an appeale of robbery against his lord, for that he may lawfully take the goods of the villein

[l] 18. E. 3. 32.
11. H. 4. 93.
1. H. 4. 6.
29. H. 6. tit.
C. rone 17.

[123. b]

(8) [See Note 189.]

(1) [See Note 190.]

(2) [See Note 190*.]

[m] Fleta, li. 1. c. 5. 1. H. 4. 6. villein as his own. [m] And if in an appeale of death it be found for the plaintife, he is infranchifed for ever. *Hinc enim est, quod eo ipso sunt hujusmodi domini servos suos amiffuri, cum de injuriis fuerint convicti.* And there is no diverfitie herein, whether he be a villein regardant or in groffe, although some have faid the contrary.

Sect. 190.

AUXY, un niefte, que est ravie per sa feignior, poit aver un appeale de rape envers luy.

ALSO, a niefte, that is ravished by her lord, may have an appeale of rape against him.

[n] Mirror, ca. 1. sect. 12. c. 3. de Rape, & cap. 4. de Homicide. (3. Inst. 60.) **R A P E**, [n] *Raptus*, is, when a man hath carnall knowledge of a woman by force and against her will.

“*Appeale de rape.*” By the generall purview of the statutes [*] that give the appeale of rape, the niefte shall have an appeale of rape against the lord. [o] And it seemeth by the ancient authors of the law, that this so hainous an offence was severely punished by losse of eyes, and privy members; but of old time it was felony, which you may reade at large in the Second Part of the Institutes, W. 1. ca. 13.

[p] And this word *rape*, which our author here useth, is so appropriated by law to this case, as without this word (*rapuit*) it cannot be expressed by any periphrasis or circumlocution; for *carnaliter cognovit eam*, or the like, will not serve.

[124. a.]

Sect. 191.

AUXY, si un villein soit fait executor a un autre, et le feignior del villein fuit en dette a le testator en un certaine somme d'argent, que n'est my paie; en ceo case, le villeine, come executor de le testator, avera action de det envers son feignior; pur ceo que il ne recouvrera le det a son use demesne, mes al use le testator.

ALSO, if a villeine be made executor to another, and the lord of the villeine was indebted to the testator in a certaine sum of money, which is not paid; in this case, the villein, as executor of the testator, shall have an action of debt against his lord; because he shall not recover the debt to his owne use, but to the use of the testator.

(Doc. Plac. 388.) **O**F this matter sufficient hath beene spoken in this Chapter before. 21. E. 4. 50. a. The villein shall have an action as executor against his lord; and it is no plea for the lord to say, that the plaintife is his villeine; for he shall not be enfranchifed by the user of this action; because he hath it by a gift in law to the use of the testator, and not to his owne use.

Sect. 192.

ITEM, le seignior ne poit prendre hors del possession de tiel villein, que est executor, les biens le mort; et s'il face, le villeine come executor avera action de trespassse de mesmes les biens issint prises envers son seignior, et recouvrera damages al use le testator. Mes en tous tielx cases il covient, que le seignior, que est defendant en tielx actions, face protestation, que le plaintife est son villein; ou autrement le villeine serra enfranchise, coment que le matter soit trové pur le seignior, et encounter le villein, come est dit.

AL S O, the lord may not take out of the possession of such villeine, who is executor, the goods of the deceased; and if he doth, the villeine as executor shall have an action for the same goods so taken against his lord, and shall recover damages to the use of the testator. But in all such cases it behoveth, that the lord, which is defendant in such actions, maketh protestation, that the plaintife is his villein; or otherwise the villeine shall be enfranchised, although the matter be found for the lord, and against the villein, as it is said.

“**L**E seignior ne poit prendre hors del possession, &c.” Of this also sufficient hath been said before.

“*Et recouvrera damages al use del testator.*” [g] Note, damages recovered by the executor in an action of trespassse shall be assents; and yet they were never in the testator. And so it is in other like cases, as by our bookes it appeareth.

[g] 21. E. 4. 4.
b. 11. H. 6. 35. b.
3. H. 6. 2.
2. H. 4. 21.
1. H. 4. 6.

[r] If an executor hath a villeine for yeares, and the villein purchases lands in fee, the executor entreth, he shall have the whole fee simple; but because he had the villein *in autre droit*, viz. as executor to the use of the dead, it shall be assents in his hands. Note a diversity between the quantity of the estate, and the quality of it; for the law respecteth not the quantity of the estate; for not onely

[r] Doct. &
Stud. Brooke tit.
Villenage 70.

(Ante 117. a.)

24. b.] [s] tenant in taile and tenant for life of a villeine shall have the perquisite of the villeine in fee, but [t] tenant for yeares and tenant at will also shall have it in fee.

[s] L. 5. E. 4. 61.
[t] 21. H. 3. 6. 37.
(Ante 117. a.)

But the law respecteth the quality; for in what right he hath the villeine, in the same right he shall have the perquisite; as in the case of the executor abovesaid, and in the case of the bishop [u] that hath the villeine in right of his church, he shall have the perquisite in the same right.

[u] 41. E. 3. 21.

[x] So if a man hath a villeine in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the baron shall have the perquisite to him and his heires; because by the issue he is intituled to be tenant by the curtesie in his owne right.

[x] 18. E. 3. 29.

“*Protestation,*” [y] *Protestatio*, is an exclusion of a conclusion that a party to an action may by pleading incur; or it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him. But in this case without a protestation, albeit the issue be found for the lord, the villeine shall be enfranchised, as it appeareth hereafter in this Section.

Vide Sect. 193.
[y] Pl. Corn.
276. b. in Greif-
brook's case.

Sect. 193.

ITEM, si villeine fust un action de trespasse, ou un auter action, envers son seignior en un county; et le seignior dit, que il ne serra respondus, pur ceo que il est son villein regardant a son manor en auter county (1); et le plaintife dit, que il est franke, et de franke estate, et nemy villein; ceo serra trie en le county lou le plaintife avoit conceive son action, et nemy en le county lou le manor est: et ceo est in favorem libertatis. Et pur cel cause un estatute fuit fait an. 9. R. 2. cap. 2. le tenor de quel ensuist en tiel forme. Item, pur la ou plusors villeins, et niefes, sibien des graundes seigniors come des auters gentes, sibien espirituels come temporals, s'ensuent deins cities, villes, et lieux enfranchise, come en la citie de Londres, et auters semblables, et seignent divers suits envers leur seigniors, a cause de eux faire franks per le respons de leur seigniors: accorde est et assentus, que les seigniors ne auters ne soyent my forbarres de leur villeines per cause de leur respons en ley. Per force de quel estatute, si ascun villein voylloit fuer ascun maner de action a son use demesne en ascun county, ou il est fort a trier envers son seignior, le seignior poyt eslyer de pleader, que le plaintife est son villeine, ou de faire protestation que il est son villeine, et de pleder son auter matter en barre. Et si ils sont a issue, et l'issue soit trove pur le seignior, donque le villein est villein, come il fuit devant per force de mesme l'estatute. Mes si le issue soit trove pur le villeine, donque le villeine est franke; pur ceo que le seignior ne prist al commencement pur son plee, que le villeine fuit son villeine, mes ceo prist per protestation, &c.

but tooke not at the beginning for his plee, that the villeine was his villeine, but tooke this by protestation, &c.

ALSO, if a villeine sueth an action of trespasse, or any other action, against his lord in one county; and the lord saith, that he shall not be answered, because he is his villeine regardant to his mannour in another county; and the plaintife saith, that he is free, and of a free estate, and not a villein; this shall be tryed in the county where the plaintife hath conceived his action, and not in the county where the mannour is: and this is in favour of liberty. And for this cause a statute was made anno 9. R. 2. ca. 2. the tenor whereof followeth in this forme. Also, for that where many villeins and niefs, aswell of great lords as of other men, aswell of spirituall as temporall, flye and go into cities, townes, and places franchised, as into the city of London, and other like places, and seine divers suits against their lords, because they would make themselves free by the answer of their lords: it is accorded and assented, that lords nor others shall not be forebarred of their villeins by reason of their answer in law. By force of which statute, if any villeine will sue any manner of action to his own use in any countie, where it is hard to try against his lord, the lord may chuse whether he will plead, that the plaintife is his villeine, or make protestation that he is his villeine, and plead his other matter in bar. And if they be at issue, and the issue be found for the lord, then the villeine is a villeine, as he was before by force of the same statute. But if the issue be found for the villeine, then the villeine is free; because that the lord

(1) &c. in L. and M. and Roh.

"*C E O ferra trie en le countie, &c.*" Be tryed, that is, as it is intended, by the verdict of twelve men, that is called in law a trial, *triallo*. Brit. fol. 79. 125. b. 126. a.

[a] In this case the law doth favour the villein in the issue; for otherwise by the rule of law in like cases he ought to answer to the speciall matter, viz. to the regardancy; but in favour of liberty he may reply, that he is free and of free estate, and consequently this issue concerning the person shall be tryed where the writ is brought. [b] The like law it is, if issue be joyned upon the ideocy of the plaintife or defendant, it shall be tryed where the writ is brought, because it concerneth the person.

Vide Sect. 534. [b] 2. Mar. Dier 112. (Post. 125. 7. Co. 1.)

"*In favorem libertatis.*" It is commonly said, that three things be favoured in law; life, liberty, and dower.

[c] *Impius et crudelis judicandus est, qui libertati non favet. Angliæ jura in omni casu libertati dant favorem.* (F. N. B. 77. f.) [c] Fortescue, cap. 42.

[125. a.] Tryall is to finde out by due examination the truth of the point in issue or question betweene the parties, whereupon judgement may be given. And as the question betweene the parties is twofold, so is the triall thereof: for either it is *quæstio juris*, (and that shall be tried by the judges either upon a demurrer, special verdict or exception, for *cuiuslibet in suâ arte perito est credendum; et quod quisque nōrit in hoc se exerceat*; and it is commonly and truly said, *ad quæstionem juris non respondent juratores*) or it is *quæstio facti* (1). And the triall of the fact is in divers sorts, whereof a light touch is given before, Sect. 102. Of these a triall by xii. men (here intended by *Littleton*) is the most frequent and common. And some few rules of law are necessary here to be remembered (for the better understanding of the bookes of law hereafter) where and from what place, viz. *de quo vicineto*, out of what neighbourhood the jury shall come, a necessarie poynt to be knowne; for if there be a mis-tryall, (that is) if the jury commeth out of a wrong place, or returned by a wrong officer, and give a verdict, judgement ought not to be given upon such a verdict. [d] Wherein the most general rule is, that every tryall shall be out of that towne, parish, or hamlet, or place known out of the towne, &c. within the record, within which the matter of fact issuable is alledged, which is most certaine and neereft thereunto, the inhabitants whereof may have the better and more certaine knowledge of the fact (2). As if the fact be alledged *in quâdam plateâ vocat' King-street in civitate Westm. in com' Midd.* in this case the visne cannot come out of the *platea*; because it is neither town, parish, hamlet, nor place out of the neighbourhood whereof a jury may come by law. But in this case it shall not come out of *Westminster*, but out of the parish of *St. Margaret*, because that is the most certaine. But therein also it is to be noted, that if it had been alledged in *King-street* in the parish of *St. Margaret* in the county of *Middlesex*, then should it have come out of *King-street*, for then should *King-street* have beene esteemed in law a towne [e]; for whensoever a place is alledged generally in pleading (without some addition to declare the contrary, as in this case it is) it shall be taken

Abr. 609. 1. Roll. Rep. 369. Cro. Eliz. 818.) [e] 4. E. 3. 30. 8. E. 3. 68. 39. H. 6. 13. Brooke Pleading 61.

for

(1) See post. 155. b. 228. a. (2) [See Note 191.]

[f] 4. E. 4. 41. for a towne. [f] And albeit *parochia* generally alledged is a place incertaine, and may (as we see by experience) include divers townes; yet, if a matter be alledged in *parochia*, it shall be intended in law, that it containeth no more townes than one, unlesse the party doth shew the contrary. [g] But when a parish is alledged within a city, there without question the visne shall come out of the parish, for that is more certaine then the city..
 5. E. 4. 20.
 22. E. 4. 2.
 35. H. 6. 30.
 22. H. 6. 47.
 1. Co. 162.
 Digges' case.
 11. Co. 25.
 6. Co. 14.
 (Hob. 190. 2. Roll. Abr. 616.) [g] 1. E. 3. 8. 7. H. 6. 38.

[b] 22. E. 4. tit. [b] If a trespassse be alledged in *D.* and *nul tiel ville* is pleaded, Visne, f. 27. the jury shall come out *de corpore comitatús*; but if it be alledged in 6. H. 7. 3. b. *S.* and *D.* and *nul tiel ville de D.* is pleaded, the jury shall come out 11. H. 7. 22. b. *de vicineto de S.* for that is the more certaine. So if a matter be 9. E. 4. 3. a. alledged within a mannor, the jury shall come *de vicineto manerii*; 3. E. 4. 26. but if the mannor be alledged within a towne, it shall come out of 39. H. 6. Tresp. the towne, because that is most certaine, for the mannor may extend 40. 4. E. 3. 30. into divers townes. And all these points were resolved by all the (Hob. 89. 266. judges of *England* upon conference betweene them in the case of 6. Co. 65. b. *John Arundel* esquire indited for the death of *William Parker*. [*]. 1. Leon. 109. Cro. Car. 17. Cro. Jac. 302, 303. 308.) [*] 6. Co. 14. Arundel's case.

[i] 45. E. 2. 5. a. [i] In a reall action, where the demandant demands land in one 46. E. 3. 6. county, as heire to his father, and alledges his birth in another 7. Gernon's case. 18 E. 3. 58. county, if it be denied that he is heire, it shall not be tryed where the 11. H. 4. 56. b. birth was alledged, but where the land lyeth, for there the law pre- 47. sumes it shall be best knowne who is heire. But if the defendant 17. E. 3. 36. b. make himselfe heire to a woman, for that is the surer and more cer- 39. Aff. 10. tain side, and the mother is certaine, when perhaps the father is in- 38. Aff. 30. certaine, and therefore there it shall be tryed where the birth is al- 35. Aff. 7. ledged, because they have more certaine consufance then where the (Cro. Jac. 239.) land lyeth. And so it is where generally bastardy is alledged, the 1. Mich. 21. & tryall shall be in like case *mutatis mutandis*. [k] If a man plead the 32. Eliz. Rot. king's letters patents, and the other party plead *non concessit*, it shall 365. in the King's Bench, inter Edan & Frankline, ad- 1. Judge 3. Mar. judged 3. Mar. Dier 129. 18. Eliz. Dier 353. 17. Eliz. Dier 342.

Every tryall must come out of the neighbourhood of a castle, man-
 nor, town, or hamlet, or place known out of a castle, mannor, towne
 or hamlet, as some forreists and the like, as before and by the au-
 thorities thereupon quoted appeareth.

Every plea concerning the person of the plaintife, &c. shall be
 tryed where the writ is brought, as it appeareth before.

When the matter alledged extendeth into a place at the common
 law, and a place within a franchise, it shall be tryed at the common
 law.

[l] 8. E. 4. 24. [l] In an action against two, the one pleads to the writ, the other
 9. H. 6. 46, 47. to the action, the plea to the writ shall be first tryed; for, if that be
 21. H. 6. 4. found, all the whole writ shall abate, and make an end of the busi-
 18. Aff. 7. nesse.
 30. E. 3. 16, 17.
 7. E. 4. 31.

[m] 27. H. 8. 30. [m] In a plea personall against divers defendants, the one de-
 11. H. 4. 68. fendant pleads in barre to parcell, or which extendeth only to him
 [n] 15. E. 4. 25. that pleadeth it, and the other pleads a plea which goeth to the
 9. 9. H. 6. 46. whole, the plea that goeth to the whole, (that is) to both defen-
 26. E. 3. dants, shall be first tryed; and of this opinion was *Littleton* in our
 7. E. 4. 31. bookes, for the tryall of that goeth to the whole; and the other
 39. E. 3. 16, 17. defendant shall have advantage thereof, for in a personall action the
 (Cro. Jac. 124. discharge of one is the discharge of both. As for example, if one
 1. Sid 75. of
 Hob. 34. 66.

Nov 144. 2. Roll. Abr. 103.

of the defendants in trespassse pleade a release to himselfe (which in law extends to both) and the other pleads not guilty (which extends but to himselfe); or if one plead a plea which excutes himself onely, and the other pleads another plea which goeth to the whole, the plea which goeth to the whole, shall be first tryed; for, if that be found, it maketh an end of all, and the other defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a plea reall it is otherwise; for every tenant may lose his part of the lands. [n] As if a *præcipe* be brought as heire to his father against two, and one plead a plea which extendeth but to himselfe, and the other pleads a plea which extends to both, as bastardy in the demandant, and it is found for him, yet the other issue shall be tryed, for he shall not take advantage of the plea of the other, because one joyntenant may lose his part by his misplea. [o] But where an issue is joyned for part, and a demurrer for the residue, the court may direct the tryall of the issue, or judge the demurrer first at their pleasure.

[n] 9. H. 6. 46.
39. E. 3. 16, 17.

[o] 10. Co. 54.
and the bookes
there cited.

126. a.]

[p] If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the visne commeth out of a wrong place, yet if it be *per assensum partium*, and so entred of record, it shall stand; for *omnis consensus tollit errorem*. (1) And thus much of these excellent points of learning: and if you desire to know the institution and right use of this triall by twelve men, and of the antiquitie thereof, and more of this matter, read the 234. Section hereafter, which is worthy of your observation.

[p] Mich. 21.
& 22. Eliz. Dier
367. 5. Co. 36 b.
Bainham's case.
39. E. 3. 2. b.
44. E. 3. 6.
11. H. 6. 13.
5. Co. 40. Dor-
mer's case.
(5. Co. 36. b.
1. Sid. 269.)

Hob. 5. 1. Sid. 193. 2. Roll. 635. 1. Sid. 339.) (5. Co. 40. b. Cro. Eliz. 664. 1. Sid. 269.)
Vid. Sect. 234.

“*Estatute*,” or statute. This commeth of the *Latine* word *statutum*, which is taken for an act of parliament made by the king, the lords and commons, and is divided into two branches, generall and speciall. This statute here mentioned is a generall statute, and is darkely and obscurely penned.

Vid. 25. E. 3.
ca 18.
F. N. B. 77. c.
26. E. 3. 73.

“*Et s'ils sont a issue*.” [q] Issue, *exitus*, a single, certaine, and materiall point issuing out of the allegations or pleas of the plaintife and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold; a speciall issue, as here in the case of *Littleton*; or generall, as in trespassse, not guilty, in assise, *nul tort nul disseisin*, &c. And as an issue naturall commeth of two severall persons, so an issue legal issueth out of two severall allegations of advers parties.

[q] Vid. Sect.
414. 7. H. 6. 43.
9. E. 4. 36.
36. H. 6. 15.
5. E. 4. 26.
11. H. 4. 79.
(Mo. 80. 1. Ro.
Rep. 86.
1. Leon. 78.
9. Co. 110.
Cro. Cha 164.
80. Doct. Plac.
256, 257. Cro.
Jam. 87. 560.
Doct. Plac. 187.
Cro. Jam. 580.
586. 589. Hob.
233.)
7. E. 3. 34.
(Cro. El. 372.)

And to make our bookes more easie to be understood concerning this point, it is good to set downe some necessary rules (among many other) concerning joyning of issues. An issue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of *T.*: the defendant pleadeth, that he was never his receiver in manner and forme, &c. this shall referre to the count, so as he cannot be charged but by the receipt by the hands of *T.*

[r] A speciall issue must be taken in one certain materiall point, which may be best understood, and best tryed.

[r] 20. E. 3.
Issue 31.
22. E. 4. 23.

8. E. 3. 8. 9. H. 6. 18. 38. E. 3. 33.

An

(1) [See Note 192.]

A a 4

[s] 21. H. 6. 9. b. [r] An issue shall not be taken upon a negative pregnant, which
 16. E. 4. 5. implyeth another sufficient matter, but upon that which is single and
 24. E. 3. 32. 33. simple. As *ne dona pas per le fait* imply a gift by parol; therefore
 75. 31. E. 3. the issue must be *ne dona pas modo et formâ*.
 Issue 17.

13. E. 3. ib. 27. 21. E. 3. 49. 30. E. 3. 8. 10. E. 3. 32. 22. E. 3. 13. 18. E. 3. Issue 35.
 5. H. 7. 8. 31. Aff. 25. 12. E. 4. 4. 8. 2. H. 4. 23. 38. H. 6. 22. 40. E. 3. 5. 5. E. 3. 24.

[t] 12. El. Dy. [t] An issue joyned upon an *absque hoc*, &c. ought to have an affir-
 253. 22. H. 6. 19. mative after it. Two affirmatives shall not make an issue, unlesse
 32. H. 6. 23. it be lest the issue should not be tried.

2. R. 3. [u] Some issues be good upon matter affirmative and negative,
 6. H. 7. 5. albeit the affirmative and negative be not in precise words. As in
 11. H. 4. 79. debt for rent upon a lease for yeares, the defendant pleades, that the
 [u] 2. H. 7. 4. plaintiffe had nothing at the time of the lease made; the plaintiffe re-
 5. H. 7. 12. 26. plyeth that he was seised in fee, &c. this is a good issue.
 11. H. 4. 83.
 6. E. 4. 6. b.

26. H. 8. Dyer 6. in Formedon. 28. H. 8. Dyer 31. 18. H. 6. 8, 9. 15. E. 4. 32. 32. H. 6. 23.
 7. H. 6. 27. 43. Aff. 4. 9. E. 4. 36. Pl. Com. 172. a. 36. H. 6. 15. (6 Co. 24.)

[w] 26 H. 8. 3. [w] Where the issue is joyned of the part of the defendant, the
 18. El. Dy. 353. entry is, *et de hoc ponit se super patriam*; but if it be of the part of the
 (1. Sid. 215. plaintiffe, the entry is, *et hoc petit quod inquiratur per patriam*.
 290. 340. 341.
 Cro. Cha. 164.)

[x] 22. H. 6. 57. [x] There be some negative pleas that be issues of themselves,
 59. 33. H. 6. 21. whereunto the demandant, or plaintiffe, cannot reply, no more than
 3. H. 7. 9. to a generall issue, which is, *et prædictus A. similiter*. As if the
 12. E. 4. 13. tenant do vouch, and the demandant counterplead that the vouchee
 17. E. 3. 53. or any of his auncestors had any thing, &c. whereof he might make
 77, 78. a feoffment, he shall conclude, *et hoc petit quod inquiratur per patriam*,
 22. E. 3. 16, 17. *et prædictus tenens similiter*. So in a fine pleaded by the tenant, &c.
 24. E. 3. 50. the demandant may say, *quod partes finis nihil habuerunt, et hoc petit*
 40. E. 3. 19. *quod inquiratur per patriam, et præd' tenens similiter*. And so in a
 writ of dower the tenant pleads *unques seise que dower*, he shall con-
 clude, *et de hoc ponit se super patriam, et præd' petens similiter*; and so in
 many other cases; and of this opinion was Littleton in our bookes. [y]

[y] 41. E. 3. A man leaves his wife enseint with a child, issue shall not be taken that
 11. b. she was not enseint by her husband on the day of his death, for *filia-
 tio non potest probari*; but the issue must be, whether she was enseint
 the day of his death (2).

[z] 10. E. 4. [z] A protestation availeth not the partie that taketh it, if the
 Protest. 5. issue be found against him; and therefore if the issue be found for
 1. E. 4. 12. the vil'einc, he is enfranchised for ever. And yet in some special
 32. Aff. 9. case, albeit the issue be found against him that maketh the protesta-
 30. E. 3. 14. tion, yet he shall take benefit of his protestation. [*] As if a man
 9. H. 6. 59. entreth into warrantie, and taketh by protestation the value of the
 Vid. Sect. 192. land, albeit the plea be found against him, yet the protestation shall
 (Plowd. 276. serve him for the value.
 Cro. Cha. 365.
 D. & Plac. 295.)

[*] 30. E. 3. 14.

Sect. 194.

ITEM, le seignior ne poet mayhemer
 son villeine; car s'il maibema son
 villein, il ferra de ceo indite a le suit le
 roy, et s'il soit de ceo attaint, il ferra
 pur

ALSO, the lord may not mayme
 his villeine; for if he mayme his
 villeine, he shall of that be indicted at
 the king's suit, and if he be of that
 attainted,

pur ceo un grievous fine et ransome al roy. Mes il semble, que villeine n'averera pas per le ley un appeale de mayhem envers son seignior; car en appeale de mayheme home recoversa forsque damages; et si le villeine en ceo cos recoversa damages envers son seignior, et ent avoit execution; le seignior poit prendre ceo que le villeine avoit en execution de le villeine, et issint le recoverye voide, &c.

attainted, he shall for that make grievous fine and ransome to the king. But it seemeth, that the villeine shall not have by the law any appeale of mayhem against his lord; for in appeale of mayhem a man shall recover but his damages; and if the villeine in that case recover damages against his lord, and hath thereof execution; the lord may take that the villeine hath in execution from the villeine, and so the recovery is void, &c.

126. b.] “**MAYHEMER**,” [a] or *mebaigner*, a French word, of which commeth *mayhem*, *mabemium*, (*id est*) *membri mutilatio*, and *membrum est pars corporis habens destinatam operationem in corpore*. *Mayhemium* verò dici poterit, ubi aliquis in aliquâ parte sui corporis effectus sit inutilis ad pugnandum. And the law hath so appropriated this word *mayhem*, which our author here useth, to this offence, as *mayhemavit* cannot be expressed by any other word, as *mutilavit*, *truncavit*, or *detruncavit*, or the like.

1. Sid. 215.) Mirror, cap. 1. sect. 9. Vide Sect. 1. (4. Co. 39. b.)

“*Il ferra indite*,” or rather *endite*, and so is the original; for it commeth of the French word *enditer*, and signifieth in law an accusation found by an enquest of 12 or more upon their oath; and the accusation is called *indictamentum*. And as the appeale is ever the suite of the partie, so the inditement is alwaies the suite of the king, and as it were his declaration. [b] Some derive it from the Greeke word *ενδεικνυμι* to accuse.

[b] Lamb. Just. of Peace.

[c] *N'averera, &c. appeale de mayhem.*” Because in that appeale he shall recover but damages, which the lord after execution might take againe, and so the judgement be *inutile* and illufory, and *faciens incipit à fine*. And the law never giveth an action, where the end of it can bring no profit or benefit to the plaintife. But here it it is to be observed, that, albeit the party grieved can have no action for the mayhem, yet at the king's suite he shall be punished therefore, for the reason hereafter expressed in this Section. [d] And in ancient time there were appeales *de plagis et de imprisonamento*; but they are out of use, and turned to actions of trespassse.

[c] Vide 1. H. 4. 6. b. (4. Co. 43.)

[d] Fleta, lib. 1. cap. 40. Britt. cap. 25. Bract. 145. Mirr. cap. 3.

“*Fine*,” *finis*. Here *fine* signifieth a pecuniarie punishment for an offence, or a contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis*, because it is an end for that offence. [e] And in this case a man is said *facere finem de transgressionem*, &c. *cum rege*, to make an end or fine with the king for such a transgression. It is also taken for a summe given by the tenant to the lord for concord, and an end to be made. [f] It is also taken for the highest and best assurance of lands, &c.

[e] Regist. Judic. 25. 8. Co. 59. Beecher's case. (8. Co. 38.)

[f] Vide Sect. 74. 174. 441. (11. Co. 42.)

Here it is good to see, what a fine differeth from an amerciament. [g] Amerciament in Latine is called *miseriordia*, for that it ought to be assessed mercifully. And this ought to be moderated by affeerement of his equals, or else a writ *de moderatâ misericordiâ* doth lie. And

[g] 8. Co. 59. Beecher's case. F. N. B. 76. (1. Ro. Abr. 238.)

thereof

[b] Glanvil. lib. 9. cap. 11. *thereof Glanville saith thus. [b] Est autem misericordia domini regis, quâ quis per juramentum legalium hominum de vicineto eatenus amerciandus est, ne aliquid de suo honorabili contememento amittat.*
 Magna Charta, cap. 14.
 Flet. lib. 2. c. 43. & 60. & lib. 1. cap. 43. Bract. lib. 3. fol. 116.

[i] 22. E. 3. [i] The cause of an amerciament in plea reall, personall, or mixt
 1. & 2. 14. E. 3. (where the king is to have no fine) is, for that the tenant or defend-
 Amerciam. 16. dant ought to render the demand (as he is commanded by the king's
 8. R. 2. ibid. writ) the first day; which if he do, he shall not be amerced. So as
 26, &c. for the delay that the tenant or defendant doth use, he shall be

[k] Pl. Com. [k] And albeit the amerciament cannot be imposed,
 401. Cole's case. nor the king fully intituled thereunto, untill judgement be given,
 37. H. 6. 21. because by the judgement the wrong is discerned; yet a par-
 5. Co. 49. Vaughan's case. don before judgement, after judgement given, shall discharge the
 party, because the originall cause, viz. the delay, &c. is pardoned.

[l] Vaughan's [l] What then if a *præcipe* be brought against an infant, and, hang-
 case ubi supra. ing the plea, he commeth of full age? He shall be amerced for the
 Beecher's case delay after his full age. So likewise if the demandant or plaintife
 ubi supra. be nonsuit, or judgement given against him, hee shall be likewise
 (1. Roll. Rep. amerced *pro falso clamore*.
 11.)

(5. Co. 49. a. Cro. Cha. 410. 8. Co. 62. b.)

[m] F. N. B. 31. [m] And for the payment of this amerciament the demandant or
 f. 47. c. & 101. a. plaintife, &c. shall finde pledges; and those demandants or plaintifes
 Bract. lib. 4. fol. that shall find no pledges, (as the king, the queene, an infant, &c.) shall
 254. 17. E. 3. 75. not be amerced. And therefore when such are demandant or plain-
 18. E. 3. 2. Br. tife, the writ shall not say, *Si rex, &c. fecerit te securum de clamore suo*
 rit. Amerciam. *prosequenda*.
 53. 43. Aff. 45, &c.

[n] Beecher's [n] If a writ doe abate by the act of the demandant or plaintife,
 case. 8. Co. 60. b. or for matter of forme, the demandant or plaintife shall be
 (1. Ro. Abr. amerced; but if it abate by the act of God, as by the death of one,
 213.) where there is two or the like, there shall be no amerciament. And
 to an amerciament imprisonment belongeth not, as it doth to a fine
 or ranfome. If you desire to read more of fines and amerciaments,
 vide 8. Co. 38, 39, &c. *Greslye's case*; and 11. Co. 43, 44. *God-
 freye's case* (1).

[o] Fleta. lib. 1. [o] It is to be knowne that *wite*, *wita*, is an old Saxon word, and
 cap. 47. Stat. de signifieth an amerciament; as *fledwite*, an amerciament for fleeing
 exposit. ver- or being a fugitive; and so is *flemiswite*, *blodwite* an amerciament
 borum. for drawing of blood, *ferdwite* concerning warfare; and so *lether-
 wite*, *childwite*, *wardwite*, and the like. Sometimes it signifieth for-
 feiture, sometimes freedom, or acquittall.

[p] Lamb. ex- [p] And *bote* is also an ancient Saxon word, and sometimes signi-
 plication of fieth amerciament, or compensation, as *theftbote*, *manbote*; or free-
 Saxon words. dome from the same, as *brigbote*, *castlebote*, *burghbote*.
 Leges Inæ, cap. 19.

[q] Lamb. ubi [q] *Wera* or *were* [q] sometimes signifieth amerciament or compensa-
 supra, and Fleta, tion, but properly *Wera* *Anglicè idem est in Saxonis lingua, vel pretium*
 lib. 1. cap. 47. *wite hominis appretiatum*; which and the like words you shall often
 reade in ancient charters.

[r] Dier, 6. Eliz. "Ranfome," [r] *Redemptio*, is here taken for a grand summe of
 232. money for redeeming of a great delinquent from some heynous
 crime,

crime, who is to be captivate in prison untill he payeth it. Some hold it to amount to his whole estate, and others hold that ranfome is a treble fine. [s] But in legall understanding a fine and ranfome are all one; for, upon the statute of *Merlebridge*, cap. 3. upon these words, *Non ideo puniatur dominus per redemptionem*, [t] the tenant shall not have (where the law diltraineth within his fee where nothing is behind) an action of trespass *quare vi et armis* against his lord; for therein the lord should be punished by redemption, that is, by fine, and in that action the fine is very small. And this is manifest by many authorities in all succession of ages; and this appeareth by our author in this place; for he saith, *Il ferra pur ceo un grievous fine et ranfome*; where fine and ranfome must of necessitie, in his opinion, be taken for all one; for if the fine and ranfome were divers, then should the party that mayhemed the villeine, pay two summes, one for a fine, and another for a ranfome, which never was done. And aptly a redemption and a fine is taken to be all one; for, by the payment of the fine, he redeemeth himself from imprisonment, that attendeth the fine, and then there is an end of the businesse.

21. E. 4. 3. Mich. 17. & 18. Eliz. Bevel's case, 4. Co. 11. & 9. Co. 76. Comb's case.

It signifieth properly a summe of money paid for the redemption of a captive, and is compounded of *re* and *emo*, that is, to redeeme or buy again. And it is to be knowne, that [u] by the ancient law of *England*, if the defendant in an appeale of mayhem had been found guilty, the judgement against the defendant had beene, that he should lose the like member that the plaintife lost by his means; as if the plaintife had lost an hand, the defendant also should lose one, *et sic de cæteris*; in respect whereof the writ said, [w] *felonicè mahemavit*, for that the defendant should lose a member.

supra. Brit. cap. 3. fol. 77. b. (4. Co. 43.

Alwaies at the common law, when the defendant should lose life or member, the writ said *felonicè, &c.* And now albeit the law be changed (for at this day the plaintife shall, as our author saith, recover but damages) yet the writ of appeale saith still *felonicè*.

Note, the life and members of every subject are under the safeguard and protection of the king; for, as *Bracton* [x] saith, *Vita et membra sunt in potestate regis*. And therewith agreeth a notable record, *Pasch. 19. E. 1. coram rege*, Rot. 36. Northt. *Vita et membra sunt in manu regis*, to the end that they may serve the king and their countrie, when occasion shall be offered. Nay, the lord of the villeine, for the cause aforesaid, cannot mayheme the villeine, but the king shal punish him for mayheming of his subject (for that hereby he hath disabled him to do the king service) by fine, ranfome, and imprisonment, untill the fine and ranfome be paid. So as there is a manifest diversity between a ranfome and an amerciament; for ranfome is ever when the law inflicteth a corporal punishment by imprisonment (and so is also a fine); but otherwise it is of an amerciament, as hath bin said. And [y] ancients have said, that *ranfome n'est forsque redemption de paine corporel per fine des deniers*. This offence of mayhem is under all felonies deserving death, and above all other inferior offences; so as it may be truly said of it that it is, *Inter crimina majora minimum, et inter minora maximum* (2). And in my circuit in anno 1. Jacobi regis, in the county of *Leicester*, one

Wright,

[s] See the Second Part of the Institutes, Merlebr. cap. 3. (2. Inst. 106. Plowd. 66. b. F. N. B. 90. c. 4. Co. 11. b. Post. 281. b.) [t] 5. H. 7. 10. 48. E. 3. 5. 6. 41. E. 3. 26. 44. E. 3. 13. 2. H. 4. 4. 11. H. 4. 78. 1. H. 6. 6. 9. H. 7. 14. 8. E. 4. 15. 10. E. 4. 7. 20. E. 4. 3.

[u] 40. Aff. 9. Mirror, cap. 4. & ca. 5. sect. 12. Britt. cap. 25. fol. 48. Bract. lib. 3. fol. 144. 145. Fleta, lib. 1. cap. 38. [w] Bract. ubi Post. 288. a.)

[x] Bract. lib. 7. fol. 6. Pasch. 19. E. 1. coram Rege, Rot. 36. Northt.

[y] Mirror, cap. 5. sect. 1. & 3.

Wright, a young strong and lustie rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indited, fined and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid. [127. b.]

“*Voyde, &c.*” Here by (*&c.*) is implied a maxime in law, *Quod inutilis labor et sine fructu non est effectus legis*. And againe, *Non licet, quod dispendio licet*. And, *Sapiens incipit à fine*; and, *Lex non præcipit inutilia*. [z] Therefore the law forbiddeth such recoveries, whose ends are vaine, chargeable, and unprofitable.

[z] Vide Sect.
273 and 578.

Sect. 195.

ITEM, si un villein soit demandant en action real, ou plaintife en action personal envers son seignior, si le seignior voile pleder en disabilitie de son person, il ne poit faire pleine defence; mes il defendera forsque tort et force, et demandera judgment, s'il serra respondus, et monstra son matter maintenant, comment il est son villein, et demandera judgment s'il serra respondue.

ALSO, if a villeine be demandant in an action real, or plaintife in an action personall against his lord, if the lord will plead in disabilitie of his person, he may not make plaine (1) defence; but he shall defend but the wrong and the force, and demand the judgement, if he shall be answered, and shew his matter by and by, how he is villeine, and demand judgement if he shall be answered.

“**DEMAUNDANT**,” *Petens*, is hee which is actor in a reall action, because hee demandeth lands, &c. and *plaintife*, *quærens*, in actions personals and mixt, *quia queritur de injuriâ, &c.* *Tenant, tenens*, in reall actions; and *defendant, defendens*, in actions personall and mixt.

“*Defence*” (2) commeth of the word *defendo*, so called of the manner of the pleading, viz. *prædict. A. B. defendit vim et injuriam, &c.*

For example, in a personall action brought by *A. B.* against *C. D.* the defence is, *Et prædictus C. D. defendit vim et injuriam quando, &c. et damna, et quicquid quod ipse defendere debet, &c.*

In this defence there be three parts to be considered. First, when he defendeth the wrong and the force, this hath a double effect, viz. to make himselfe partie to the matter; and this is the reason, that the defendant in this and the like actions can plead no plea at all, before he makes himselfe partie by this part of the defence; as it appeareth here by *Littleton*, that [a] if the defendant will plead in disabilitie of the person of the plaintife, he must first make himselfe partie by this first part of the defence. Neither can he plead to the jurisdiction of the court, without this part of the defence (3). Secondly [b], by the defence of the damages, he affirmeth that the plaintife is able to

[a] 40. E. 3. 36.
14. H. 6. 18.
35. H. 6. 12.
1. E. 4. 15.
[b] 29. E. 3. 23.
8. H. 6. 3.

(1) It should be full.
(2) [See Note 196.]

(3) Held *contra* by three judges against Holt chief justice. Carth. 220.

to sue, and (upon just cause) to recover damages. (4) Thirdly, and by the last part, viz. and all that which he ought to defend, when and where he ought, he affirmeth the jurisdiction of the court. *Et sic de similibus*. And of such necessitie it is for the tenant or defendant to make a lawfull defence, as [c] albeit he appeareth and pleads a sufficient barre without making defence, yet judgment shall be given against him.

[c] 36. H. 6.
Judgement 58.

[d] If villenage be pleaded by the lord in an action reall, mixt or personal, and it is found that he is no villaine, the bringing of a writ of error is no enfranchisement; because thereby he is to defeat the former judgement; and if, in the mean time, the plaintiffe or demandant bring an action against the lord, he need make no protestation, so long as the record remaines in force, for at that time he is free, but the lord shall be restored to all by a writ of error.

[d] 18. E. 4. 6.
& 7.

Sect. 196.

ITEM, 6 maners de homes y sont, (5) *queux, s'ils suont action, judgement poit estre demand, s'ils ferront respondus, &c.* Un est, lou villeine suist action envers son seignior, come en le cas avantdit.

ALSO, there are fixe manner of men, who, if they sue, judgement may be demanded, if they shall be answered, &c. One is, where a villeine sueth an action against his lord, as in the case aforesaid.

[128. a.] “UN est lou villeine suist action, &c.” Littleton here rehearseth fix kinds of disabilities of the person, disabling him to sue any action reall, personall, or mixt.

[e] Bract. lib. 5.
fol. 421.
Britton, cap. 49.
fol. 125.

Mirror, cap. 2. sect. 18.

13. H. 4. Surety 12. A Gardian shall disable.

“S'ils ferront respondus.” This is the legall conclusion of the plea, when the plea is in disability of the person. And of the verbe *respondere* came *responsalis*, often used in the ancient authors of the law. [f] *Responsalis* was he, that was appointed by the tenant or defendant, in case of extremity and necessitie, to alleage the cause of the parties absence, and to certifie the court upon what tryall he will put himselfe, viz. the combate or the country. So as his power was more than the effoinor, which casteth an effoigne only to excuse the absence of the party, as an estranger, which casteth a protection, doth. For by the common law, the plaintiffe or defendant, demandant or tenant, could not appeare by attornie without the king's special warrant by writ or letters patents, but ought to follow his suite in his owne proper person (by reason whereof there were but few suits). [g] *Abusio est a reteinier attorney sans breve de la chancerie*. And therefore Bracton saith truly, [b] *Attornatus hæc omnia facere potest* (that is, plead all manner of pleas). *Est igitur magna differentia inter attornatum et responsalem*. So as the statutes that give the making of attorneyes, have worne out *responsales*. Now what manner of men attorneyes ought to be, or rather what they ought not to be, heare what antiquity hath said: [i] *Attorneyes poient estre tous ceux,*

(Post. 352. b.)

[f] Bract. lib. 4. fol. 212. b. & lib. 5. fol. 349.
Fleta, li. 6. c. 11.
Glanvil. lib. 11. cap. 1.
Brit. ca. 126.
Vid. W. 1. c. 43.
F. N. B. 25. C.
Regist. 9.
(F. N. B. 156. e.)

[g] Mirr. ca. 5. sect. 1.
[b] Bracton ubi supra.

(5. Co. 89.
7. Co. 74.)
[i] Mirror, ca. 2. sect. 21.

(4) Adjudged acc. on Demurrer, Carth. 229.

(5) In L. and M. Roh. P. and Red. the reading is *contre queux*.

ceux, aux queux ley voile suffer. Femmes ne poient estre attorneyes, ne enfans, ne serfs, ne nul que est en garde ou autrement faut de foy, ne nul crimineux, ne nul effoigne, ne nul que n'est a le foy le roy, ne nul que ne poet estre counter, &c.

Sect. 197.

LE 2. est, lou un home est utlage sur action de det ou trespas, ou sur autre action ou indictment, le tenant, ou defendant, poit monstrier tout le matter de record, et l'utlagarie, et demander judgement, s'il serra respondue; par ceo que il est hors de la ley de fuer aucun action durant le temps que il soit utlage.

THE second is, where a man is outlawed upon an action of debt or trespass, or upon any other action or indictment, the tenant, or the defendant, may shew all the matter of record, and the outlawry, and demand judgement, if he shall be answered; because he is out of the law to sue an action during the time that he is outlawed.

[k] Bracton, lib. 5. fol. 421. Britton, ca. 22. fol. 39. Mirr. ca. 3. de exceptions a provors ca. 4. defaults punishable. [l] 21. E. 4. 49. b. 21. H. 6. 30. b. 14. H. 6. 15. [m] 12. E. 4. fol. 12. [n] 7. H. 4. 40. [o] 23. H. 8. c. 3. 2. H. 7. 7. (1. Sid. 43. Cro. Jam. 425. 616.) [p] Mirr. ca. 3. acc. 12. E. 4. 16. 33. H. 6. ca. 2. [q] Bract. lib. 3. fo. 125. 3. H. 5. Utlagary 111. 38. E. 3. 5. [r] Britton, fo. 39.

LE 2. est [k] lou un home est utlage, &c." But these generally words receive a distinction, viz. [l] if an executor or an administrator sueth any action, utlary in the plaintife shall not disable him: because the suit is *in autre droit*, that is, in the right of the testator, and not in his owne right. And for the same reason, [m] a maior and communalty shall have an action, though the maior be outlawed. [n] In a writ of error to reverse an utlary, utlary in that suit, or at any stranger's suit, shall not disable the plaintife, because if he in that action should be disabled, if he were outlawed at several men's suits, he should never reverse any of them. [o] In an attainr outlawry in the plaintife cannot be pleaded in disability of the person (1). [p] Outlary in *Chester* or *Durham* shall not disable the plaintife in any court at *Westminster*, &c. [q] *Minor verò, et qui infra ætatem 12 annorum fuerit, utlagari non potest, nec extra legem poni; quia ante talem ætatem non est sub lege aliquâ nec in decennâ.* [r] He that is abjured the realme may be disabled, for that he is *extra legem*, and yet he is not properly outlawed.

"Monstrier tout le matter de record." Here note two things: first, by this word (*monstrier*), that [s] when any man pleads an utlary in disability of the person, hee must shew forth the record of the outlawrie *maintenant sub pede sigilli*, (because the plea is but dilatorie) unlesse the record be in the same court. But if he plead an outlawrie in barre, if it be denied, he shall have a day to bring it in. [128. b.]

[s] 20. E. 2. Coron. 232. 19. Aff. p. 10. 3. H. 6. 15. b. 37. H. 6. 23. 5. H. 7. 6. Eliz. Dyer 228. F. N. B. 244. Stanf. Pl. Coron. 105. (Noy. 74. 143.) (8. Co. 142. b.)

[t] 28. Aff. 49. 12. E. 3. Utlagarie, 3. M. 4 & 5. El. Dyer 222. 38. E. 3. 13. (Post. 228. b. 5 Co. 111.)

Secondly [t], before the defendant can disable the plaintife, the outlawrie must appeare of record; and the judgement after the *quinto exactus* given by the coroners in the county court is not sufficient

cient, until the writ of *exigent* be returned, and the outlawrie appeare of record: which is manifest by *Littleton's* owne words, (viz.) *matter de record*; whereof see more hereafter, Sect. 503.

It is to be observed, that there be two kinds of appearances before the *quinto exactus*, to avoid the outlawry, viz. an appearance in deed, that is, to render himselfe, &c. and the other is by an appearance in law, [*u*] that is, by purchasing a *superfedeas* out of the court where the record is, which is an appearance of record: and therefore, though it be not delivered to the sherife before the *quinto exactus*, yet it shall avoid the outlawrie; and so are the bookes, that speake hereof, to be intended.

Dyer 3. El. 192. 5. El. 223. 4. H. 4. le 1. case. 8. H. 4. f. 7. 37. H. 6. 17. 33. E. 3. Err. 77. 21. H. 6. 20. (Mo. 73.)

[*u*] Tr. 44. El. in Com. Banc. inter Mere & Dolburie. 33. H. 6. 1. 11. H. 4. 34.

[*w*] If a man be outlawed at the suit of one man, all men shall take advantage of this personall disability. And so it is in case of *alien née*, and of *excommenement*. But otherwise it is in case of villenage, for that disability is onely given to the lord.

[*w*] 33. H. 6. 19. b. &c.

“*Durant le temps que il est utlage.*” [*x*] If the defendant plead an outlawrie in the plaintife, in disability of his person, and the plaintife after that plea pleaded purchase a charter of pardon; because the charter hath restored him to the law, the defendant shall answer. So note, the disability abateth not the writ, but disinableth the plaintife, untill he obtaineth a charter of pardon; and so it appeareth here by *Littleton*.

[*x*] 44. E. 3. 27. (Doct. Plac. 162. 396.)

“*Judgement s'il serra respondue.*” [*y*] If the ground or cause of the action bee forfeited by the outlawry, then may the outlawry bee pleaded in barre of the action; as in an action of debt, detinue, &c. But in reall actions, or in personall, where dammages be incertaine, (as in trespassse of batterie, of goods, of breaking his close, and the like) and are not forfeited by the outlawrie, there outlawry must be pleaded in disability of the person.

[*y*] 9. El. Dyer 262. 7. H. 4. 4. b. Stanf. Pl. Coron. 188. 5. Co. 109. in Foxleye's case. 28. E. 3. 92. 29. Aff. p. 47. 63. 30. H. 6. 5. (Doct. Plac. 395.)

[*z*] And it is to be observed, that, in the reign of king *Ælfred*, and untill a good while after the Conquest, no man could have been outlawed but for felonie, the punishment whereof was death. But now the law is changed, as it appeareth by that which hath beene sayd. And hereby you shall understand old bookes and records, which say, that an outlawed man had *caput lupinum*, because he might be put to death by any man, as a wolfe that hateful beast might.

[*z*] Mir. c. 1. sect. 3. & c. 3 & 4. 12pe. cap. 5. sect. 1.

[*] *Utlagatus et waiviata capita gerunt lupina, quæ ab omnibus impunè poterunt amputari; meritò enim sine lege perire debent, qui secundum legem vivere recusant.* And another saith, [*a*] *Utlage pur felonie teigne leu pur loup, et est crible wolffeshered, pur ceo que loup est beast haye de tous gents, et de ceo en avant list al ascun de le occider al foer del loup, dont custome soloit estre de porter les testes al chiefe lieu del county, ou de la franchise, et soloit la avoir demy mark del countie pur chescun teste de utlage et de loupe.* And this agreeth with the law before the Conquest, [*b*] *Utlagatus lupinum gerit caput, quod Anglicè wolffeshhead dicitur; et hæc est lex communis et generalis de omnibus utlagatis.* [*c*] But, in the beginning of the raigne of king *Edward* the third, it was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood, that it should not be lawfull for

[*] Fleta, lib. 1. ca. 27. Bract. li. 5. f. 421. Brit. f. 20. b. [*a*] Mir. ca. 4. sect. 4. defaults punishable.

[*b*] Lamb. fol. 128. [*c*] 2. Aff. P. 3. 2. E. 3. tit. Coron. 148.

for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe such punishments and paines of death as if he had killed any other man; and so from thenceforth the law continued untill this day. (*Nota, wolfshead and wulferfod is all one.*) [*] And after in *Bracton's* time, and somewhat before, processe of outlawry was ordained to lie in all actions that were *quare vi et armis*, which *Bracton* calleth *delicta*; for there the king shall have a fine (1). But since, by divers statutes, processe of outlawry doth lie in account, debt, detinue, annuity, covenant, *action sur le statute de 5. Rich. 2. action sur le case*, and in divers other common or civill actions. But now let us heare what *Littleton* will say unto us.

[*] *Bracton*, lib. 5. fol. 421.
3. H. 6. 9. b.
40. E. 3. 5.
35. H. 6. 6.
40. E. 3. 2.

Sect. 198.

LE 3. est un alien, que est née hors de la ligeance nostre seignior le roy, si tiel alien voile suer un action reall ou personall, le tenant ou defendant poit dire, que il fuit née en tiel pais, que est hors de la ligeance le roy, et demander judgement si il serra respondue.

THE third is an alien, which is born out of the ligeance (2) of our soveraigne lord the king, if such alien will sue an action reall or personal, the tenant or defendant may say, that he was borne in such a country, which is out of the king's allegiance, and aske judgement if he shall be answered.

[a] *Bract.* lib. 5. fol. 415. 427.
Mir. c. 1. sect. 3.
c. 5. sect. 1. & ca. 3. except. a provors.
Flet. li. 6. c. 47.
Brit. fo. 29.
13. E. 3. Bre. 677.
25. E. 3. de Natis ultra mare. 31. E. 3. Cofinage 5.
42. E. 3. 2.
9. E. 4. 7.
11. H. 4. 26.
Calvin's case.

ALIEN, [a] *Alienigena*, is derived from the *Latine* word *alienus*, and according to the etymologie of the word, it signifieth one borne in a strange country, under the obedience of a strange prince or country, (and therefore *Bracton* saith, that this exception, *propter defectum nationis*, should rather be *propter defectum subjectionis*) or as *Littleton* saith, (which is the surest) out of the liegeance of the king. Note, here *Littleton* saith not *hors del realme*, but *hors de ligeance*; for he may be borne out of the realme of *England*, yet within the liegeance. And he that is borne within the king's liegeance is called sometime a *denizen*, *quasi deins née*, borne within, and thereupon in *Latine* called *indigena*, the king's liegeman; for *ligens* is ever taken for a naturall borne subject.

[129. a.]

14. H. 4. 19, 20. 3. H. 6. 55. 22. H. 6. 38. Stanf. Pl. Cor. 197. a. 7. Co. 1. Pl. Com. 268. per Sanders. Vid. Sect. 1. 439, 440, 441.

But many times in acts of parliament, *denizen* is taken for an alien borne, that is infranchised or denized by letters patent, whereby (2. Inst. 741.) the king doth grant unto him, [b] *quod ille in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur, tanquam ligens noster, infra dictum regnum nostrum Angliæ oriundas, et non aliter, nec alio modo.* But the king may make a particular denization: [c] as he may grant to an alien, *quod in quibusdam curiis suis Angliæ audiat ut Anglus, et quod non repellatur per illam exceptionem, quod sit alienigena et natus in partibus transmarinis*, to enable him to sue onely. The severall senses of which word must be gathered *ex antecedentibus, adjunctis, et consequentibus*; and they that take him in that sense, derive the word from *donaison* (i. e.) *denatio*, because his freedome is given unto him by the king.

[b] 9. E. 4. f. 8. Pl. Com. 130. b.

[c] Rot. Parl. 22. E. 1. Elias de Daubenie.

There

(1) [See Note 197.]

(2) [See Note 198.]

There is another kind, and that is an alien naturalized, and that must be by act of parliament. And this alien naturalized to all intents and purposes is as a naturall borne subject (1), and differeth much from denization by letters patent; for if he had issue in *England* before his denization, that issue is not inheritable to his father; but if his father be naturalized by parliament, such issue shall inherit. So if an issue of an *Englishman* be borne beyond sea, if the issue be naturalized by act of parliament (2), he shall inherit his father's lands; but if he be made denizen by letters patent, he shall not; and many other differences there be betweene them. (Cro. Cha. 601.)

"*Ligeance*," à *ligando*, being the highest and greatest obligation of dutie and obedience that can be. Ligeance is the true and faithful obedience of a liegeman or subject to his liege lord, or soveraigne. *Ligeantia est vinculum fidei: ligeantia est legis essentia.* Vide Calvin's case ubi supra.

Ligeantia domino regi debita est duplex.

Perpetua,

Temporanea

1. *Originaria, sive naturalis, sive nata* [d]; and this is alwayes absolute and incident inseparable. *Nemo patriam, in qua natus est, exuere, nec ligeantie debitum ejurare possit.*

2. *Data, aut per denizationem, aut per naturalizationem (ut supradictum est) et ista ligeantia per denizationem potest esse sub conditione.*

Localis, quia quilibet alienigena, qui in hoc regno sub protectione regis degit domino regi ligeantiam debet. And if he be indicted of high treason, the indictment shall say, [e] *contra ligeantie sue debitum; et ideo dicitur temporanea et localis, quia non durat, nisi quousque infra regnum moratur.*

Limitata, as when one is made denizen for life, or in taile. [f] But one cannot be naturalized, either with limitation for life, or in taile, or upon condition: for that is against the absolutenesse, puritie, and indebilty of naturall allegiance. (Hob. 271.)

[d] 13. El. Dier f. 300. b. Doctor Storie's case.

[e] 3. & 4. P. & M. Di. 144. 7. Co. 6, &c. Calvin's case.

[f] 9. E. 4. 7. Calvin's case ubi supra. (Cro. Jam. 539. 2. Ro. Rep. 95.)

[*] An abbot, prior, or prioress alien, shall have actions reall, personal, or mixt, for any thing concerning the possessions or goods of his monastery here in *England*, though hee bee an alien borne out of the king's ligeance; because he bringeth it not in his owne right, but in the right of his monastery, and not in his naturall but in his politique capacity (1).

[*] 13. E. 3. Br. 264. 20. E. 3. Annuity 24. 17. E. 3. 21. 40. E. 3. 10. 27. Aff. 48. 14. H. 4. 7. 22. E. 4. 44.

21. H. 7. 7. Stanf. Præf. 54. L'etat. de Carlisle, 35. E. 1.

"*Reall ou personall.* [b] In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the king, and one that is subject to one that is in league with the king; (2) and true it is that an alien enemy shall maintaine neither reall nor personall action, *donec terra fuerint communes*, that is untill both na-

(Doct. Plac. 8. Dy. 2. b.) [b] Braſton, 426, 427. 430. 8. F. 3. 51. 5. E. 2. Aiel 8.

tions

[129. b.]

(1) [See Note 199.]

(1) [See Note 201.]

(2) [See Note 200.]

(2) [See Note 202.]

13. E. 3. Bre. 677. 22. E. 3. 14. 20. 21. E. 3. Cofinage 5. 42. E. 3. 2. 13. E. 4. 9. 11. H. 4. 26. 9. E. 4. 7. 19. E. 4. 7. 20. E. 4. 6. 13. E. 4. 9, 10. 32. H. 6. 23. 38. H. 8. Br. Denizen. 10. 1. E. 6. Nonhab. Br. 13. & 62. Vid. 4. H. 3. Dower 179. 6. E. 3. 263. 31. H. 6. ca. 4. Livre d'Entries in Eject. 7. 6. H. 8. Dier 2. 6. H. 7. 15.

[*] 29. E. 3. Br. Denizen 15. Vid. Stanf. Pl. Co. 197. a.

[*] If an alien be made a prior or abbot, the plea of *alien née* shall not disable him to bring any reall or mixt action concerning his house, because he is *in auter droit*, as before is said (4).

“*Hors del ligeance nostre seignior le roy.*” Here *Littleton* doth not say, out of the realme or beyond the sea, (5) (as he doth Sect. 439, 440, 441. 677.) but out of the ligeance; for (as hath beene said before) a man may be borne out of the realme, viz. of *England*, as in *Ireland*, *Fersey*, and *Guernsey*, &c. (6) and yet seeing he is not borne out of the ligeance of the king, as *Littleton* here speaketh, he is no alien. But hereof there is so much and so plentifully spoken in our bookes, and especially in the case of *Calvin ubi supra*, as this shall suffice.

“*Et demaunder judgment s'il serra respondue.*” So as the tenant or defendant shall neither plead *alien née* to the writ or to the action, but in disability of the person; as in case of villenage and outlawrie before. [i] And *Littleton* is to be intended of an alien in league; for if he be an alien enemy, the defendant may conclude to the action.

[i] Livre d'Entries, Alien 1. (Doct. Plac. 89. Dy. 2. b.)

Sect. 199.

LE 4. est un home, que per judgement done envers lui sur un briefe de *præmunire facias*, &c. est hors de protection le roy. Si il jüst ascun action, et le tenant ou le def. monstrera tout le record envers luy, il poit demaunder judgement s'il serra respondue; car la ley le roy et les briefs le roy sont les choses, per queux home est protect et aide; et issint, durant le temps que home en tiel cas est hors de la protection le roy, il est hors de estre aide ou protect per la ley le roy, ou per briefe le roy.

THE fourth is a man, who by judgement given against him upon a writ of *præmunire facias*, &c. is out of the king's protection. If he sue any action, and the tenant or defendant shew all the record against him, he may aske judgement if he shall be answered; for the law and the king's writs be the things, by which a man is protected and holpen; and so, during the time that a man in such case is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ.

“*PRÆMUNIRE.*”

(3) [See Note 203.]

(4) [See Note 204.]

(5) See ante 107. a. n. 6. there, and post.

(6) Rot. Parl. 9. H. 6. n. 20. indenization of one born in Wales. Simile Rot. Parl. 23. H. 6. n. 26. Co. 2. Inst. 741. on stat. 2. H. 4. Hal. MSS.

“**PRÆMUNIRE.**” Some hold an opinion, that the writ is called a *præmunire*, because it doth fortifie *jurisdictionem jurisdictionis* regionum coronæ suæ of the kingly lawes of the crown against foreine jurisdiction, and against the usurpers upon them, as by divers acts of parliaments appeare. But in truth it is so called of a word in the writ; for the words of the writ be, *præmunire facias præfatum A. B. &c. quòd tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, and so doe divers interpreters of the civill and canon law use it; for they are *præmuniti* that are *præmoniti*. By the statutes before quoted in the margent you shall perceive what statutes were made before *Littleton* wrote, and what have beene ordained since to make offences in danger of a *præmunire*.

6. H. 4. c. 1. 24. H. 8. c. 12. 25. H. 8. c. 19, 20. 26. H. 8. c. 16. 1. Eliz. ca. 1.
5. Eliz. c. 1. 13. Eliz. ca. 1, 2. 3. 27. Eliz. c. 2. 39. Eliz. ca. 18.
For Precedents, Vide Mich. 29. E. 3. coram rege in Thesaur. Pasch. 44. E. 3. Ibid. Melbourne's case. Mich. 38. H. 6. Ibid. the case of Rich. Beauchamp and others. Hil. 25. H. 8. coram rege, the case of Nic. Bishop of Norwich. Trin. 36. H. 8. Rot 9. coram rege, the case of the Bishop of Bangor. Mich. 26. & 27. Eliz. coram rege, Perrot against D. Bevance and others. Booke of Entries, fo. 429, & 430. & ibid. Mich. 9. H. 7. f. 23.

“*Hors del protection le roy.*” The judgement in a *præmunire* is, that the defendant shall be from thenceforth out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king, and that his body shall remaine in prison at the king's pleasure. So odious was this offence of *præmunire*, that a man that was attainted of the same, might have bin slaine by any man, without danger of law; because [k] it was provided by law, that a man might doe to him as to the king's enemy, and any man may lawfully kill an enemy. But queene *Elizabeth* and her parliament [*], liking not the extreme and inhumane rigor of the law in that point, did provide, that it should not be lawfull for any person to slay any person in any manner attainted in or upon any *præmunire*, &c. Tenant in taile is attainted in a *præmunire*, he shall forfeit the land but during his life; for albeit the statute of 16 R. 2. ca. 5. enacteth, that in that case their lands and tenements, goods and chattels, shall be forfeit to the king, that must bee understood of such an estate as he may lawfully forfeite, and that is during his owne life. And these generall words doe not take away the force of the statute *de donis conditionalibus*, but hee shall forfeit all his fee simple lands, states for life, goods and chattels; and so was it resolved in *Trudgin's* case.

Brooke Coron. 196. [*] 5. Eliz. ca. 1. Hil. 21. El. Trudgin's case resolved per les Justices. 7. H. 4. 20. Simon Beverley's case. (Post. 391. 2. Ro. Abr. 177.)

“*Car la ley le roy et les briefes le roy, &c.*” There be three things, as here it appeareth, whereby every subject is protected, viz. *rex, lex, et rescripta regis*, the king, the law, and the king's writs. The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The proccesse and the execution, which is the life of the law, consisteth in the king's writs. So as he that is out of the protection of the king, cannot be aided or protected by the king's law, or the king's writ. *Rex tuetur legem, et lex tuetur jus.* [l] Besides men attainted in a *præmunire*, every person that is attainted of high-treason, petit-treason,

(3. Inst. 119.)
For statutes,
Vid. 35. E. 1.
stat. de Carlisse.
25. E. 3. c. 22.
25. E. 3. Stat.
de Provisors.
27. E. 3. c. 1.
38. E. 4. c. 3.
2. R. 2. c. 12.
3. R. 2. c. 3.
12. R. 2. c. 5.
16. R. 2. c. 5.
2. H. 4. c. 3. & 4.
1. Eliz. ca. 1.

Book cases.
21. E. 3. 40. B.
18. H. 6. b.
9. E. 4. 2.
35. E. 3. 7.
24. H. 8. tit.
Præmunire 16.
10. H. 4. 12.
27. E. 3. 84.
6. H. 7. 14.
44. E. 3. 36.
11. H. 7. tit.
Præmunire, p. 5.
17. H. 7. Justice
Spilmans in
Turberville's
case. Kelwey,
f. 105. Doct. &
Stud. Lib. 2.
cap. 32.
Brooke tit.
Præmunire 21.
Temps E. 6.
Bishop Barloe's
case.
[k] 24. H. 8.

[l] 4. E. 4. 8.
1. E. 4. 1. b.
30. E. 3. 4.
8. Eliz. Dier 245.

[*] Mich. 9. E. 3.
coram rege, Rot.
84. Warw.

Protec- { Gene-
tion, { rall.
{ Parti-
{ cular.

Of the Generall,
vide 7. Co. Cal-
vin's case per
totum.

(F. N. B. 28. B.
1. Leon. 185.

Mo. 239.

2. Ro. Abr. 32.)

treason, or felony, is disabled to bring any action: for he is [*] *extra legem positus*, and is accounted in law *civilitur mortuus*.

It is to be understood, that there is a generall protection of the king, whereof *Littleton* here speaketh; and this extends generally to all the king's loyall subjects, denizens and aliens within the realme, whose offences have not made them incapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs that *Littleton* here speaketh of. This particular protection is of two sorts; one, to give a man immunity or freedome from actions or suits; the second, for the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawfull molestation or wrong. The first is of right, and by law; the second are all of grace, (saving one) for the generall protection implyeth as much. Of the first sort some are *cum clausulâ (volumus)*; so called, because the writ hath this word (*volumus*) in it, viz. *volumus quoddam interim sit quietus de omnibus placitis et querelis, &c.* and the other a protection *cum clausulâ (nolumus)*; so called for the like reason. Of protections *cum clausulâ (volumus)* for staying of pleas and suites there be foure kindes, viz. 1. *Quia profecturus* (so called by reason they are part of the words of the writ). 2. *Quia moraturus* (so named for distinction for the like cause). 3. *Quia indebitatus nobis existit* of the matter. 4. When any sent into the king's service in warre is imprisoned beyond sea. The former are for staying of actions and suits in generall. The third is for staying of suits of the subject for debts and duties due by the king's debtor to them. Of the fourth you shall reade hereafter in this place. For the former two these nine things are to be observed. 1. For what cause they are to be granted. 2. For what persons they are allowable. 3. A threefold time is to be considered, viz. the time of the purchase of them, the time of the continuance of them, and the time when they shall be cast. 4. In what place the service is to be performed. 5. In what actions these protections are allowable. 6. Under what seale and to whom they are directed. 7. Who is to allow or disallow of them. 8. By whom they are to be cast, and in what manner. 9. How upon just cause they may be repealed or disallowed. I must but point at these matters, to make the studious reader capable of them, and referre him to the bookes and other authorities at large, being excellent points of learning.

[a] 39. H. 6. 39.

3. H. 6. tit.

Protection 2.

13. R. 2. ca. 16.

[b] Mirror, cap.

3. Sect. 23.

Britton, fo. 281.

Fleta, lib. 6.

cap. 7, 8, &c.

Bracton.

[*] 5 Marie

Dyer 162.

(Cro. Cha. 389.)

[c] 19. H. 6. 51.

30. E. 3. 21.

F. N. B. 28. 1.

11. E. 3. Rot.

Pat. 3. part, for

the Countesse of
Warwick.

As to the first, it is of two natures: the one concernes services of war, as the king's souldier, &c. the other wisdom and counsell, as the king's ambassador or messenger *pro negotiis regni*. Both these being for the publique good of the realme, private mens actions and suites must be suspended for a convenient time; for *jura publica anteferenda privatis*; and againe, *jura publica ex privatis promiscuè decidi non debent*. [a] And the cause of granting of a protection must be expressed in the protection, to the end it may appeare to the court that it is granted *pro negotiis regni et pro bono publico*, [b] or, as some others say, *pur le common profit del realme*. And Britton saith, *nostre service, sicome estre en nostre force, et le defence de nous et de nostre people, &c.* [*] A man in execution *in salvâ custodiâ* shall not be delivered by a protection.

[c] To the second, these protections are not allowable onely for men of full age, but for men within age, and for women (1), as necessary

(1) [See Note 205.]

necessary attendants upon the campe, and that in three cases, *quia laetrix, seu nutrix, seu obstetrix*.

[130. b.] [d] Corporations aggregate of many are not capable of these two protections, either *profectura* or *moratura*, because the corporation itself is invisible, and resteth onely in consideration of lawe. [d] 30. E. 3. 1. 21. E. 4. 36. 21. E. 3. 97. [e] Protection for the husband shall serve also for the wife. [e] 35. H. 6. 3. 43. E. 3. 23. 48. E. 3. 7. 4. H. 5. Protection 107.

[f] Albeit the vouchee, tenant by rescuit, preier in aide, or garnishee, bee no parties to the writ, yet before they appeare, a protection may be cast for them; because when the demandant grants the voucher or rescuit, in judgment of law they are made privie. But if the demandant counterplead the voucher or rescuit, then untill it be adjudged for them, and so they privie in law, a protection cannot be cast for them. And so it is of the garnishee, a protection may be cast for him at the day of the returne of the *scire facias*. [g] No protection can be cast for the demandant or plaintife; because the tenant or defendant cannot sue a re-sommons, or a re-attachment, but the plaintife onely, that sued out the summons or attachment, &c. must sue also the re-sommons or re-attachment. And so it is of an actor in nature of a plaintife, &c. as the garnishee after appearance, and an avowant, and the like. [h] An officer of the king's rescuit, or any other officer in any court of record, whose attendance is necessary for the king's service or administration of justice, being sued, cannot have a protection cast for him. [f] 45. E. 3. Protect. 37. 3. H. 6. 18. 30. 8. H. 6. 16. 9. H. 6. 36. 40. E. 3. 18. 32. E. 3. Protect. 54. 21. E. 3. 14. H. 4. 16. 45. E. 3. tit. Protect. 40. 14. E. 3. Protect. 66. (2. Ro. Abr. 324.) [g] 24. E. 3. 26. 47. E. 3. 5. 5. H. 5. 5. 38. E. 3. 1. F. N. B. 28. g. 20. R. 2. Protect. 25. E. 3. 43. [h] 7. H. 4. 3. a.

Protect. 106. 22. H. 6. 28. 9. H. 6. 36. 43. E. 3. 36. 17. E. 3. 24. 24. E. 3. 26. 13. E. 3. Protect. 71. 14. E. 3. ib. 65. 63. 20. E. 3. ibid. 84. [i] 9. E. 3. Protect. 80, 81. 32. E. 3. ib. 55. 16. E. 2. ib. 77. 13. E. 3. ib. 70. 41. E. 3. ib. 95. 41. E. 3. 32. 42. E. 3. 9. 5. H. 5. 7. 3. H. 4. 15. 2. R. 2. Protect. 45. 43. E. 3. ibid. 31. 2. H. 6. 22. 21. H. 6. 41. 38. E. 3. 12. 7. H. 6. 21. 33. E. 3. Protect. 116. 4. H. 4. 4. 45. E. 3. 24. 28. 11. E. 4. 7. F. N. B. 28. k. (11. Co. 5. b.) 29. E. 3. 41.

[i] In every action or plea real or mixt against two, where protection doth lie, a protection cast for the one doth put the plea without day for all. So it is in debt, detinue and account. But in trespassse, or any action in nature of trespassse, which is in law severall, where every one may answer without the other, there a protection cast for the one shall serve for him onely, unless they joyne in pleading; or if they plead severall pleas, and one *venire facias* is awarded against all, there a protection cast for one, shall put the plea without day for all; and therefore in former times the plaintife used to sue out severall *venire facias* in those cases for feare of a protection, &c. [j] 3. H. 6. Protect. 2. 39. H. 6. 39. 44. E. 3. 12. 13. R. 2. c. 16. 3. H. 4. 16. 11. H. 4. 7. 7. E. 4. 27. 28. H. 6. 1. 17. H. 6. Protect. 56. 10. E. 3. 54. 13. E. 3. Amerciament 18. 7. Co. 7. 8. Calvin's case. 13. R. 2. cap. 16. (2. Ro. Abr. 322. Ante 69. b.) [k] As to the three-fold time, first, a protection *profectura* regularly must not be purchased hanging the plea. But this faileth, when he goeth in the king's service in a voyage royall; and that is two-fold; either touching warre, and that onely is when the king himselfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's ambassage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this is also called a voyage royall. But a protection *moraturæ* may be purchased and cast *pendente placito*. [l] 4. H. 6. 22. 17. E. 3. 76. 35. E. 3. 10. Protect. 115. 34. E. 3. ibid.

[k] As to the three-fold time, first, a protection *profectura* regularly must not be purchased hanging the plea. But this faileth, when he goeth in the king's service in a voyage royall; and that is two-fold; either touching warre, and that onely is when the king himselfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's ambassage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this is also called a voyage royall. But a protection *moraturæ* may be purchased and cast *pendente placito*.

[l] Regularly a protection cannot be cast, but when the party hath a day in court, and when if he made default, it should save his default. Therefore when execution is to bee granted against body, lands,

124. 27. E. 3. 79. lands, or goods, no protection can be cast; because the defendant hath no day in court. If a protection be cast at the *nisi prius* for one, if before the day in banke it bee repealed by *Innotescimus*, yet because it was once well cast, it shall save his default; but if the protection be disallowed, either for variance, or that it lay not in the action, or the like, there it shall turne to a default.

29. E. 3. Protect. 85. 88.
2. E. 4. 15.
19. E. 3. Protect. 82. 79.
13. E. 3. ib. 72.
9. E. 3. 21.
3. H. 6. 55. 4. H. 6. 22. 11. H. 6. 14. 14. H. 6. 22. 21. H. 6. 10. 27. H. 6. 4.
28. H. 6. 1. 35. H. 6. 58. 44. E. 3. 2. 16. 48. E. 3. 8. 7. H. 4. 5. 14. H. 4. 23.
27. E. 3. 78.

[m] 22. E. 3. 4.
16. E. 3. Protect. 47.
44. E. 3. 16.
3. E. 3. Amendment 18.
34. E. 3. Protection 123.
[n] 39. H. 6. 39.
F. N. B. f. 28.
Fleta, lib. 6. ca. 8.
Temps E. 1.
Grand cape 26.
(Post. 254. b.)
[o] Brit. fol. 282,
283. & 280.
Fleta, lib. 6.
cap. 8. Accord.

[m] If a man hath a protection, and notwithstanding plead a plea, yet at another day of continuance after that a protection may be cast; so at a day after an exigent; but after appearance he cannot cast a protection in that terme, untill a new continuance be taken.

[n] Thirdly, no protection, either *profectura* or *moratura*, shall indure longer than a yeare and a day next after the *teste* or date of it. And so it is of an *essoigne de service le roy*. If a protection bear *teste* 7. *die Januarii*, and have allowance *pro uno anno*, the re-summons, re-attachment, or re-garnishment, may be sued 8. *Januarii* the next yeare; and yet that is the last day of the yeare.

And where Britton, treating of an *essoigne* beyond the *Græcian* sea, in a pilgrimage, &c. saith thus, [o] *ascun gent nequident se purchassent nos letters de protection patens durable a un an, ou a 2 ou a 3 ans, et jalameyns font attorneys generals, ausi per nos letters patens: et ceux font bien et sagement, car nul grand seignior, ne chivalier de nostre realme, ne doit prendre chemyn sans nostre conge, car issint poet le realme remainer disgarney de fort gente.*

Three things are hereupon to be observed. First, that this was a protection of grace, whereof more shall be said hereafter. Secondly, that it was for the safetie of the great men of the realme, and that they should make generall attornies, so as no actions or suits should be thereby staid. Thirdly (by the way), that great men could not passe out of the realme without the king's licence.

[p] 1. E. 3. 25.

[p] A protection granted to one, &c. untill he be returned from Scotland, was disallowed for the incertaintie of the time.

[q] 7. Co. 8.
Calvin's case.
7. E. 4. 29.
F. N. B. 38.
c. g. h.
7. H. 4. 14.
19. H. 6. 35.
38. H. 6. 3.
32. H. 6.
3. R. 2. Rot.
Parliament nu.
21. 22. E. 4.
Protect. 18.
6. R. 2. ibid. 14.

[q] To the fourth, the protection, as well *moratura* as *profectura*, must be regularly to some place out of the realme of England, and that must be to some certaine place, as *super salvâ custodiâ Calicie*, &c. and not to *Carlisle* or *Wales*, which are within the realme, or to the like. But it may be to *Ireland* or *Scotland*, because they are distinct kingdomes; or to *Calice*, *Aquitaine*, or the like. But a protection *quia moratur super altum mare*, will not serve, not onely because (as some thinke) that *mare non moratur*, but for the incertaintie of the place, and for that a great part of the sea is within the realme of England.

8. R. 2. ibid. 125. 11. H. 4. 57. Regist. judic. 14. 36. H. 6. tit. Protect. 27.
Regist. orig. 88. sepe.

[r] Bract. li. 5.
139. 140.
Britton, 181.
Flet. li. 6. ca.
7. 8. &c.
10. E. 2. Protect. 109.
34. E. 3. ib. 122.
19. E. 3. ib. 78.
33. E. 3. ib. 99.

[r] To the fifth, in some actions protections shall not be allowed by the common-law; and in some actions they are ousted by act of parliament. Actions at the common law, as all actions that touche the crowne, as appeales of felony, and appeales of mayhem. [s] So where the king is sole partie, no protection is to be allowed; in like manner in a *decies tantum*, where the king and the subject are plaintifes; but, in late acts of parliament, protections in personal actions

[131. a.]

are expressly ousted. A protection may be cast against the queene the consort of the king.

[t] In a writ of dower *unde nihil habet*, no protection is allowable, because the demandant hath nothing to live upon. Otherwise it is in a writ of right of dower. Likewise in a *quare impedit*, or assise of darreine presentment, a protection lieth not, for the imminent danger of the laps. Neither lieth a protection in assise of *novel disseisin*; because it is *festinum remedium*, to restore the disseisee to his freehold, whereof he is wrongfully and without judgement disseised.

[u] In a *quare non admisit*, a protection is not allowable, because it is grounded upon the *quare impedit*; and the like in a certificate upon an assise for the like reason; *et sic de similibus*. A protection *quia profecturus* is not allowable (as hath beene said) in any action commenced before the date of the protection, unlesse it be in a voyage royall. [w] An infant is vouched, and at the *pluries venire facias*, a protection was cast for the infant; and disallowed, because his age must be adjudged by the inspection of the court.

[x] By act of parliament no protection shall be allowed in an attaint (but at the common law a protection for one of the petite jury had put the plea without day for all); nor in an action against a gaoler for an escape; nor for victuals taken or bought upon the voyage or service; nor in pleas of trespassse, or other contract made or perpetrated after the date of the same protection.

[y] In a writ of error brought by an infant upon a fine levied, the plaintife sued a *scire facias* against the conusee, for whom a protection was cast, and the court examined the age of the plaintife, and by inspection adjudged him within age, and recorded the same, and then allowed the protection; and this can be no mischief to the plaintife: whereupon it followeth, that albeit the plaintife dyeth afterwards before the fine be reversed, yet, after his age adjudged and recorded, his heire shall in that case reverse the fine for the nonage of his ancestor. [a] And so it was resolved in the case of *Kekerwicke* (1) in a writ of error brought by him, by the opinion of the whole court of the king's bench. Otherwise it is if the plaintife dyeth before his age inspected.

[b] Note, in judiciall writs which are in nature of actions, where the partie hath day to appeare and plead, there a protection doth lie; as in writs of *scire facias* upon recoveries, fines, judgements, &c. Albeit by the statute of W. 2. effoignes and other delayes bee ousted in writs of *scire facias*, yet a protection doth lie in the same. So it is in a *quid juris clamat*, and the like. But in writs of execution, as *habere facias seisinam, elegit*, execution upon a statute, *capias ad satisfaciendum, jeri facias*, and the like, there no protection can bee cast for the defendant; because he hath no day in court, and the protection extendeth onely *ad placita et querelas*, and must be allowed by the court, which cannot bee but upon a day of appearance.

[c] In a writ of disceit brought against him that obtained and cast a protection upon an untrue summe in delay of the plaintife, that protection is allowable. In an action brought upon the statute of labourers a protection doth lie, *et sic de similibus*.

To

[d] 35. H. 6. 2.
Artic. super
Cart. 6.

46 E. 3. Peti-
tion 19.

[*] 2. Co. 17.
Lane's case.

8. Co. 68.
Trollop's case.

20. H. 6. 25.

2. E. 4. 4.

38. H. 6. 23.

[e] 43. E. 3.
Protect. 96.

[f] 21. E. 4. 18.

[g] 38. H. 6. 23.

[d] To the sixth, no writ of protection can be allowed, unlesse it be under the great seale, [*] and it is directed generally.

[e] To the seventh, the courts of justice, where the protection is cast, are to allow or disallow of the same, bee they courts of record or not of record, and not the sherife, or any other officer or minister.

[f] To the eighth, the protection may be cast, either by any stranger, or by the partie himselfe. An infant feme-covert, a monke, or any other, may cast a protection for the tenant or defendant. And this difference there is when a stranger casteth it, and when the tenant or defendant casteth it himselfe; [g] for the defendant or tenant casting it, he must shew cause wherefore he ought to take advantage of the protection; but an estranger neede not shew any cause, but that the tenant or defendant is here by protection.

[b] 44. E. 3. 12.
47. E. 3. 6.

[b] As to the ninth, a protection may be avoyded three manner of wayes. First, upon the casting of it before it be allowed. Secondly, by repeale thereof after it be allowed. (2) By disallowing of it many wayes; as for that it lieth not in that action, or that he hath no day to cast it, or for materiall variance betweene the protection and the record, or that it is not under the great seale, or the like. [i] Thirdly, after it be allowed, by *Innotescimus*; as if any farry in the country without going to the service for which he was retained over a convenient time after that he had any protection, or repaire from the same service upon information thereof to the lord chancellor, he shall repeale the protection in that case by an *Innotescimus*. But a protection shall not be avoyded by an averment of the partie in that case, because the record of the protection must be avoyded by matter of as high nature.

[i] 13. R. 2.
c. 16.

11. H. 4. 70.

7. H. 6. 22.

22. H. 6. 50.

30. H. 6. 3.

19. H. 6. 35.

21. E. 4. 20.

1. H. 6. 6.

42. E. 3. 9.

44. E. 3. 2.

39. E. 3. 4. 5.

20. E. 3. Pro-

tect. 80.

34. E. 3. ibid.

119.

[k] 44. E. 3. 4.

12. 47. E. 3. 6.

34. E. 3. Pro-

tect. 119.

28. H. 6. 3.

34. H. 6. 22.

30. H. 6. 3.

32. H. 6. 4.

[k] There is a clause in the protection to this effect: *præsentibus minime valituris, si contingat ipsum, &c. à custodia castri prædicti recedere. Or, si contingat iter illud non arripere, vel infra illum terminum à partibus transmarinis redire.* Whereupon there be two conclusions to bee observed.

First, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *Innotescimus*, that the re-fommons or re-attachment shall be granted upon the repeale within the yeare; for the protection that was allowed had the said clause in it. And of that opinion be our later bookes; and the repeale by *Innotescimus* should serve for little purpose, if the law should not be taken so.

Secondly, that albeit he that had the protection, either *moraturæ* or *profecturæ*, returne into England, and haply be arrested and in prison, yet, if he came over to provide munition, habiliments of warre, victuals, or other necessities, it is no breach of the said conditionall clause, nor against the act of 13. Richard 2. cap. 16. for that in judgement of law comming for such things as are of necessity for the maintenance of the warre, *moraturæ* according to the intention of the protection and statute aforesaid. And thus much of the two first protections, *cum clausulâ volumus, profecturæ* and *moraturæ*.

[l] Registrum
28. b.
F. N. B. 28. b.

[l] As to the third protection *cum clausulâ volumus*, the king by his prerogative regularly is to be preferred in payment of his duty

or

(2) The sense requires *thirdly* here; and But the print in the former editions is as we have given it.

or debt by his debtor before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis*. (1) And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached untill hee paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof [m] it is enacted by the statute of 25. E. 3. that the other creditors may have their actions against the king's debtor, and proceed to judgement, but not to execution, unlesse he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts.

This kind of protection hath (as it appeareth) no certaine time limited in it. But in some cases the subject shall be satisfied before the king; [n] for regularly whensoever the king is intitled to any fine or duty by the suit of the party, the party shall be first satisfied, as in a *decies tantum*. And so if in an action of debt the defendant denie his deed, and it is found against him, he shall pay a fine to the king, but the plaintife shall be first satisfied; and so in all other like cases. And so it is in bills preferred by subjects in the star chamber, there costs and dammages (if any be) shall be answered before the king's fine, as it is daily in experience.

The fourth protection *cum clausulâ volumus* is, when a man sent into the king's service beyond sea is imprisoned there, so as neither protection *profecturæ* or *moraturæ* will serve him; and this hath no certain time limited in it; [o] whereof you shall read at large in the *Register*, and *F. N. B.*

[p] Now we are at length come to protections *cum clausulâ nolumus*; all which, saving one, are of grace, and, as hath beene said, are implied under the generall protection; for, as *Fitzherbert* saith, every loyall subject is in the king's protection. Of these protections of grace, you shall not read much in our yeare bookes, because they stayed no actions or suites. [q] Of the divers formes of these you shall read at large in the *Register*, and *F. N. B.* which were too long and needlesse to be here recited.

The protection *cum clausulâ nolumus*, that is of right, is, that every spirituall person may sue a protection for him and his goods, and for the fermors of their lands and their goods, that they shall not be taken by the king's purveyor, nor their carriages or chattels taken by other ministers of the king, which writ doth recite the statute of 14. E. 3.

Of these protections I cannot say any thing of mine owne experience; for albeit queene *Elizabeth* maintained many warres, yet she granted few or no protections; and her reason was, that he was no fit subject to be employed in her service that was subject to other mens actions, lest she might be thought to delay justice (2).

33. H. 8. c. 29.
in the preamble.
41. E. 3. tit.
Execution 38.
18. E. 3. ibid.
56.
27. E. 3. 88. b.
4. E. 4. 16.
3. Eliz. Dier 197.
Rot. Pat,
27. E. 3. part.
1. m. 2.
[m] 25. E. 3.
cap. 19.
(Cro. Cha. 389,
390. Hob. 115.)

[n] 41. E. 3. 15.
17. E. 3. 73.
29. E. 3. 13.
4. E. 4. 16.

[o] Regist. saepe.
F. N. B. 28. c.

[p] Vide 7. Co.
8, 9. Calvin's
case.

[q] Regist. 280,
&c. F. N. B. 29.
A. B. C. D. E.
F. G. H. Regis-
ter 280. Statut.
de 14. E. 3.
F. N. B. 3c. A.

(1) See ante 30. b.

(2) [See Note 206.]

Sect. 200.

LE 5. est, un home que est enter et professe en religion. Si tiel fuist un action, le tenant ou defendant doit monstrer, que tiel est enter en religion en tiel lieu, en l'order de Saint Benet, et la est moigne professe, ou en l'order des friers, preachers ou minors, et la est frere professe, et issint des auters orders de religion, &c. et demaundera judgement s'il serra respondue. Et la cause est; pur ceo que quant un home entra en religion, et est professe, il est mort en ley, et son firs, ou auter cousin maintenant luy enheritera, auxy bien sicome il fuit mort en fait. Et quant il entra en religion, il doit faire son testament, et ses executors; les queux executors averont un action de det due a luy devant l'entre en religion, ou auter action que executors poient aver, sicome il fuit mort en fait. Et s'il ne fait ses executors quant il entra en religion, donques l'ordinarie doit committer l'administration de ses biens a auters homes, sicome il fuit mort en fait.

THE fifth is, where a man is entred and professed in religion. If such a one sue an action, the tenant or defendant may shew, that such a one is entred into religion in such a place, into the order of Saint Benet, and is there a monke professed, or into the order of friers, minors or preachers, and is there a brother professed, and so of other orders of religion, &c. and aske judgement if he shall be answered. And the cause is this; that when a man entreth into religion, and is professed, he is dead in the law, and his sonne, or next cousin incontinent shall inherit him, as well as though he were dead indeed. And when he entreth into religion, he may make his testament, and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed. And if that he make no executors when he entreth

[a] Bract. lib. 5. fo. 415. 421. Brit. ca. 21. fo. 39. Fleta, lib. 6. ca. 41. 5. E. 2. tit. Nonabil. 26. 3. H. 6. 24. 1. E. 3. 9. 7. H. 4. 2. Doct. & Stud. 141. 21. R. 2. Judgement 263. 11. R. 2. ibid. 107. (Post. 136. a.) [b] 4. H. 4. ca. 17. 25. H. 8. ca. 12. [c] Bracton, fo. 421. b.

ENTRE et professe en religion." [a] It is to be observed, that a man doth enter into religion at his first coming, and liveth under obedience; but hee is not professed, till a yeare be past, or some time of probation. And he is said to be professed, when he hath taken the habit of religion, and vowed three things, obedience, wilfull poverty, and perpetual chastity. And therefore our authour saith here, *enter et professe*.

"En l'order des freres, preachers ou [b] minors." It appeareth in our bookes, that of friers there were foure orders, viz. minors, augustins, preachers, and carmelites; and the *franciscani, capuchini*, and *observantes*, are included under the title of minors; and they were called observants, because they bee not conventuall or joyned together in a brotherhood, but live separately, and bind themselves to observe more strictly the rites of their order. [c] *Cum quis semel se religioni contulerit, renunciat omnibus quæ sæculi sunt, habitū distinctione, utrū habitum probationis susceperit, vel habitum professionis.*

"Il est mort en ley." Civiler mortuus, or mortuus sæculo.

[d] Bracton, fo. 421. b. [d] There is a death in deede, and there is a civill death, or a death

death in law, *mors civilis* and *mors naturalis*, as here it appeareth; and therefore to oust all scruples, leases for life are ever made during the naturall life, &c. (1) If the father enter into religion, then shall his sonne and heire have an assise of mordancester, and the writ shall say, [e] *Si W. pater, &c. die quo obiit habitum religionis assumpsit, in quo habitu professus fuit, ut dicitur.*

Britton, fo. 226.
250, 251.
Fleta, lib. 6. ca.
41.

[e] F. N. B. 196.
5. E. 4. 3.

132. b.] "*Auxibien come il fuit mort en fait.*" But yet to three purposes, profession, that is, the civill death, hath not the effect of a naturall death.

First, this civill death shall never derogate from his owne grant, nor be any mean to avoid it. And therefore if tenant in taile maketh a feoffment in fee, and entreth into religion, his issue shall have no formedon during his life; because that should be in derogation of his own grant, and be a meane to avoyd the same.

(F. N. B. 213, A.)

[f] Secondly, it shall never give her availe, without whose consent he could not have entred into religion, and therefore his wife after his civill death shall not be indowed, untill his naturall death. But if the wife, after her husband hath entred into religion, alien the land which is her owne right, and after her husband is deraigned, the husband may enter and avoid the alienation.

[f] 32. E. 1.
Dower 176.
31. E. 3. Collusion 29.
33. E. 3.
Entre Conge 52.
21. E. 4. 14.
(Ante 33. b.)

Thirdly, it shall not worke any wrong or prejudice to a stranger that hath a former right; and therefore if the disseisor entreth into religion, and is professed, so as the land descends to his heire, yet this descent shall not tolle the entrie of the disseisee.

[g] A woman cannot be professed a nunne during the life of her husband. But some do hold a diversitie, [b] that *ante carnalem copulam*, the husband or wife may enter into religion without any consent, but *post carnalem copulam* neither of them can without consent of the other.

[g] 5. E. 4. 3. 20
[b] 18. H. 6.
33. per Fortesc.

[i] But if a man holdeth lands by knights service, and is professed in religion, his heire within age, he shall be in ward. [k] If I be disseised, and my brother releaseth with warranty, and is professed in religion, and the warranty descendeth upon me, this warrantie shall binde me; because I am his heire, and such inheritance as my brother had shall descend upon me.

[i] 31. E. 3.
Collusion 29.
[k] 34. E. 3.
Garranty 71.
Vid. the Chapter
of Warranty,
Sect.

[l] And if one joyntenant be professed in religion, the land shall survive to the other. If a man or a woman be professed in religion in *Normandie*, or in anie other foraine part, such a profession shall not disable them to bring any action in *England*, because it wanteth triall; but they must be professed in some house of religion within this realme, for that may be tried by the certificate of the ordinarie, so as of foraine professions the common law taketh no knowledge (1). [m] And yet in some case one that is professed in religion within the realme shall have an action: as if he be made an executor, or if he be an administrator, he shall maintaine an action, not in his owne right, but in right of the dead.

[l] 21. R. 2.
Judgm. 263.
(Post. 181. b.)

[n] If a monke be made a bishop, or a parson, or a vicar, he shall have an action concerning his bishopricke, parsonage, or vicarage, *et sic de similibus.*

[m] 10. E. 3. 511.
14. E. 3. Executors 87.
5. H. 7. 25.
21. H. 6. 30.
3. H. 6. 24.
[n] 44. E. 3. 9.
Nonability 3.
14. H. 8. 16.

And

(1) [See Note 207.]

[132. b.]

(1) See ante 3. b. n. 7. to which add the

arguments in the case of *Thornby* and *Fleetwood*, 1. Stra. 347. Com. 207. 10. Mod. 113. 356. 406.

[o] 2. H. 4. 7.
 8. H. 5. 6.
 7. E. 4. 30.
 44. E. 3. 4.
 20. E. 3.
 Vill. 10. & Non-
 ability 9.
 49. E. 3. 4.
 [*] Bract. fo.
 415, 416. 429.
 Mir. c. 2. sect.
 14.
 14. H. 4. 37. b.
 5. H. 7. 26.
 Vid. Sect. 296.
 14. E. 4. 36.
 [p] Mir. ubi
 supra.
 [q] 22. Aff. 87.
 21. E. 3. 41, 42.
 22. E. 3. 2.
 37. H. 6. 8.
 32. H. 6. 36.
 Bract. l. 5. f. 416.
 420. 13. E. 3.
 Bre. 261.
 22. E. 3. 2.
 38. H. 6. 7. b.
 54. E. 3. 34. b.
 45. 7. R. 2.
 Nonability 3. 9.
 [r] 4. H. 3.
 Bre. 766.
 [s] 2. H. 4. f. 7. a.
 (1. Bulstr. 140.
 Mo. 7. 666. 851.
 1. Ro. Rep.
 400.)
 [t] 10. E. 3. 53.

[u] 1. H. 4. 1. b.

[o] And if a monke be farmer of the kinge, yeelding a rent, he shall have an action concerning that farme. And albeit *Littleton* speaketh generally of one that is professed in religion, yet must it not be understood of the soveraigne or head of the religious house, as of the abbot, prior, or the like; [*] for albeit they be professed in religion, yet by the policie of the law, they are persons able to purchase, and to implead and to be impleaded, to sue and to be sued, for any thing that concernes the house of religion; for otherwise the house might be prejudiced, and other men also of their lawful actions. And this is the ancient law of *England*, as it appeareth in these words, [p] *des biens des gens de religion appent l'action al chiefe en son nosme pur luy et son covent*. But what if a monke, &c. were beaten, wounded, or imprisoned, &c. doth the law give no remedie therefore? Yes, verily; [q] for in that case the abbot and the monke shall joyne in an action against the wrong doer; and if the writ be *ad damnum ipsius prioris*, the writ is good; and if it be *ad damnum ipsorum*, it is good also. Also if a monke be by conspiracie falsely and maliciously indicted of felony and robberie, and afterwards is lawfully acquitted, his soveraigne and he shall joyne in a writ of conspiracy and the like. And where *Littleton* speaketh of a man that is professed in religion, the same law is of a nunne, *sanctimonialis, mutatis mutandis*.

[r] A wife is disabled to sue without her husband, as much as a monke is without his soveraign; and yet we read in books that in some cases a wife hath had abilitie to sue and be sued without her husband: [s] for the wife of sir *Robert Belknap*, one of the justices of the court of common pleas, who was exiled or banished beyond sea, did sue a writ in her owne name, without her husband, he being alive; whereof one said, *ecce modo mirum, quoddam femina fert breve regis, non nominando virum conjunctum robore legis*.

[t] King *Edward* the third brought a *quare impedit* against the lady of *Maltravers*; and she pleaded, that she was covert of baron; whereunto it was replied for the king, that her husband the lord *Maltravers* was put in exile for a certaine cause; and she was ruled to answer.

[u] King *Henrie* the fourth brought a writ of ward against *Sibel B.* who pleaded, that shee was covert baron, &c. whereunto it was replied for the king, that her husband for a crime that he had committed against the king and the peeres, was relegate or exiled into *Gascoigne*, there to remaine untill he obtained the king's grace: and *Gascoigne* chiefe justice, *ex assensu sociorum*, awarded that she should answer.

Sir *Tho. Egerton*, lord chancellor, in his argument which he published apart by himselfe in *Calvin's* case *de post natis* demanded what former president there was for the warrant of the lady *Belknap's* case in 2. H. 4. 7. (1) which occasioned me to search, and upon search I found, that the like judgment had bin given before at the parliament holden in *Craft. Epiph. an. 19. Edw. 1.* where the case was, that *Thomas* of *Weyland* being abjured the realme for felony in the yeare before, *Margerie de Mose* his wife, and *Richard* sonne of the said *Thomas*, exhibited their petition of right unto the parliament, for the manor of *Sobbir*, wherein her husband had but an estate for life joyntly with her, and the inheritance in *Richard* the son by fine. The earle of *Gloucester*, lord of the fee, (who, claiming

[133. a.]

Pl. in Parliam.
 19. E. 1.

claiming the land by escheat, had taken the possession thereof) alleged, *quod non fuit juri consonum, quod aliqua femina intraret in aliquas terras vivente marito suo, eo quod præfatus Thomas abjuravit regnum, et adhuc vivit; et asserit idem comes nunquam hujusmodi casum accidisse, et inde petit post multas allegationes, quod possit prædictum manerium tenere ut eschaetam suam.* Super quo per ipsum dominum regem præceptum fuit, quod tam justiciarii sui de utroque banco quam cæteri de regno suo, tam milites quam servientes in legibus et consuetudinibus Angliæ experiri, mandarentur, quod essent coram rege et ejus consilio, &c. ad certiorandum ipsum regem, qualiter et quomodo in casu isto fuerit procedendum, et qualiter temporibus præteritis et antecessorum suorum in casibus consimilibus fieri consuevit, et interim scrutantur recorda de consimilibus; ubi recitantur duo vel tres consimiles casus. Et quia, licet prius non videbatur aliquibus juri consonum fuisse, quod uxor in vitâ viri secundum sanctam ecclesiam, qualitercunque deliquisset quoad forum regium, non posset nec deberet à viro suo separari, et sic quicquid foret in possessione uxoris converteretur in potestatem viri sui, et hoc manifestè immuaret contra consuetudinem regni; et etiam quia quidam dubitabant, quod de possessionibus et bonis uxoris vir possit aliququaliter sustentari: tamen coram consilio domini regis, vocatis thesaurar' et baronibus et justiciariis de utroque banco, concordatum est, quod prædicta Margeria rehabeat talem seisinam, &c. secundum purportum finis prædicti. &c. (2) Patet etiam consimile exemplum tempore Henrici patris regis.

I have cited this solemn resolution the more at large, because there be many excellent things to be observed in it: so as by that which hath beene said, it plainly appeareth, that this opinion, concerning the hability of the wife of a man abjured or banished, was not first hatched by the judges in Henry the fourth's time. And here is to be observed, that an abjuration, that is, a deportation for ever into a forreine land, like to profession, (whereof our author speaketh here) is a civil death; and that is the reason that the wife may bring an action, or may be impleaded during the naturall life of her husband. And so it is, if by act of parliament the husband bee attainted of treason or felony, and saving his life, is banished for ever, as *Belknap*, &c. was, this is a civill death, and the wife may sue as a *feme sole*. And hereby you may understand your bookes, which treat of this matter. But if the husband, by act of parliament, have judgement to be exiled but for a time, which some call a relegation, that is, no civill death, (3). And in 8. E. 2. an abjuration is called a divorce betweene the husband and wife. *Sed opus est interprete*; for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by authority of parliament, or in case of abjuration, and that must be upon an ordinary proceeding in law, as it was in this case of *Weyland*.

Another example we have in our bookes to this effect. If the husband had aliened the land of his wife, and after had committed felony and beene abjured the realme, the wife shall have a *cui in vita* in his life-time, agreeable with the said resolution in parliament, for that the abjuration was a civill death (4).

See in the *Register*, a woman was banished out of the towne of *Calice* for adultery, by the law or custome of that place, and there appeareth *charta pardonationis pro muliere bannitâ*. *Sed nos non habemus talem consuetudinem.*

Note the ancient triall of difficult matters in law.

The great authority of judicial records and precedents.

A solemn resolution of the law in this point.

(3. Inst. 217.)
8. E. 2. Coron.
425.
So resolved in parliament upon the making of the statute of 35. E. 1. ca. 1. exilium Hugonis de Spencer patris et filii tempore E. 2. 31. E. 1. Cui in vita 31. (Ante 3. a.)

Regist. fol. 312. b.

But

(2) [See Note 208.]

(4) [See Note 210.]

(3) [See Note 209.]

[a] Vide in my preface to the Sixth Booke.

This was law before the Conquest. 10. E. 3. 26. b.

30. E. 3. 5.

18. E. 3. 1.

22. E. 3. 21.

49. E. 3. 4.

49. Aff. 8.

Quar. imp. 146.

Aid le roy 24.

[a] But by the common law, the wife of the king of *England* is an exempt person from the king, and is capable of lands or tenements of the gift of the king, as no other feme covert is, and may sue and be sued without the king; for the wisdom of the common law would not have the king (whose continuall care and study is for the publike, *et circa ardua regni*) to be troubled and disquieted for such private and petty causes; so as the wife of the king of *England* is of ability and capacity to grant and to take, to sue and be sued as a feme sole by the common law.

11. H. 4. 67. 14. E. 3. Voucher 110. 20. E. 3. Nonabil. 9. 31. E. 3. 3. H. 7. 14. 19. H. 6. 2. 28. H. 6. 13. 7. H. 7. 7. a. 26. H. 6. Flet. li. 2. ca. 63. in Fine. Pl. Com. 231. Stanf. Prær. 10. b. (Ante 3. a.)

[b] 18. E. 3. 2.

33. E. 3.

Brief 916.

F. N. B. 101. a.

[b] And such a queene hath many prerogatives; as, she shall find no pledges, for such is her dignity, as she shall not be amerced.

The queene nor the king's sonne are restrained by the statute of 1. H. 4. cap. 6. concerning grants by the king.

[c] 18. E. 3. 32.

24. E. 3. 35. 75.

[c] In a *quare impedit* brought by her, some say, that plenarty is no plea, no more than in the case of the king.

[d] 32. E. 3.

Bre. 346.

9. E. 3. 33.

[d] If any bailife of the queene's bring an action concerning the hundred, he shall say, *in contemptum domini regis et reginæ*.

The queen shall pay no tolle.

[e] F. N. B.

235. A.

[e] If the tenant of the queene alien a certaine part of his tenancie to one, and another part to another, the queene may distraine in any one part for the whole, as the king may doe; but other lords shall distraine but for the rate; and therefore where the queene so distraineth, there lyeth a writ *de onerando pro ratâ portione*.

[f] F. N. B. 1.

[f] The writ of right shall not be directed to the queene no more than to the king, but to her bailife. Otherwise it is when any other is lord.

[g] 14. E. 3.

Voucher 110.

21. E. 3. 53.

22. E. 3. 3. b.

17. E. 3. 65.

10. E. 3. 17.

5. E. 3. 4.

15. E. 3. Aide

del roy 66.

10. E. 3. 18.

26. H. 6. Aide

le roy 24.

[h] 21. E. 3. 13.

34. E. 3.

Protect. 122.

11. H. 4. 67. b.

[i] 30. E. 3. 5.

[k] L'estat. de

25. E. 3. de Pro-

ductionibus.

[l] Rot. Parl.

8. H. 6. nu. 7.

[m] 4. E. 4. 25.

6. E. 4. 4.

45. E. 3. 10. a.

18. E. 4. 19.

22. H. 6. 5.

5. H. 7. 25. b.

[n] Pl. Com.

280, 281. Greif-

brooke's case.

[g] In case of aide prier of the queene, it is *domina regina inconsulta*, and the cause of the aide prier shall not be counterpleaded no more than in the king's case. And see where the aide shall be granted of the king and queene, and where of the queene only, and she of the king. [b] But a protection shall be allowed against the queene, but not against the king. Neither shall the queene be sued by petition, but by a *præcipe*. [i] The queene is not bound by the statute of *Marlebridge* for driving a distresse into another county.

[k] If any doe compass the death of the queene, and declare it by any overt fact, the very intent is treason, as in the case of the king.

[l] No man may marry the queene dowager without the king's licence. (1) But let us now returne to *Littleton*.

"*Il poet faire son testament et ses executors, &c.*" [m] If *A*, be bound to the abbot of *D*. *A*. is professed a monke in the same abby, and after is made abbot thereof, he shall have an action of debt against his owne executors.

"*Donques l'ordinary poet committer administration, &c. sicome il fuit mort en fait.*" [n] Note the statute of 31. E. 3. ca. 11. that giveth actions to the administrators, speaketh of a man that dies intestate, which by the authority of *Littleton* extendeth as well to a civill death as to a naturall.

Sect. 201.

LE 6. est, lou un home est excommen-
ge per la ley de saint esglise, et
il suist un action real ou personal, le
tenant ou defendant poit pleder, que
celuy, que suist, est excommen-
ge, et de ceo covient monstrier lettre de l'evesque
sout son seale, tesmoignant l'excom-
mangement, et demaunders judgement,
s'il serra respondue, &c. Mes en cest
cas, si le demandant ou plaintife ceo ne
poit dedire, le breve n'abatera my, mes
le judgement serra, que le tenant ou de-
fendant alera quite sans jour, pur ceo,
que quant le demandant ou plaintife ad
purchase les letters de absolution, et ceux
sont monstres a le court, il poit aver un
resommons, ou reattachment, sur son ori-
ginal, solonque la nature de son brieve.
Mes en les autres 5. cases le brieve aba-
tera, &c. si le matter monstre ne poit
estre dedit.

THE sixth is, where a man is ex-
communicated by the law of
holy church, and he sueth an action
reall or personall, the tenant or de-
fendant may pleade, that he, that
sueth, is excommunicated, and of this
it behoves him to shew the bishop's
letters under his seale, witnessing the
excommunication, and aske judg-
ment, if he shall be answered, &c.
But in this case, if the demandant or
plaintife cannot deny it, the writ shall
not abate, but the judgment shall be,
that the tenant or defendant shall go
quit without day, for this, that when
the demandant or plaintife hath pur-
chased his letters of absolution, and
shewed them to the court, he may
have a resummons, or a reattachment,
upon his original, after the nature of
his writ. But in the other five cases
the writ shall abate, &c. if the matter
shewed may not be gainsaid.

"EXCOMMENGE, excommunicatus, excommunicatio." [a] Si-
cut quis poterit habere lepram in corpore, ita et in animâ. Ex-
communicato interdicitur omnis actus legitimus, ita quod agere non po-
test, nec aliquem convenire, licet ipse ab aliis possit conveniri.

Excommunicatio est nihil aliud quam censura à canone vel iudice ec-
clesiastico prolata et inflicta, privans legitimâ communione sacramento-
rum, et quandoque hominum. [*] It is divided into the greater and
the lesser. Minor est, per quam quis à sacramentorum participatione
conscientiâ vel sententiâ arceatur. Major est, quæ, non solum à sacra-
mentorum, verum etiam fidelium communione excludit, et ab omni actu
legitimo separat et dividit. But either of them both disableth the
party. [b] Cum excommunicato, autem, nec orare nec loqui, nec palam,
nec absconditè, nec vesci licet, exceptis quibusdam personis. But every

[134. a.] excommunication disableth not the party. [c] If bailifes and com-
mons, or any other corporation aggregate of many, bring an action,
excommenagement in the bailifes shall not disable them, for that they
sue and answer by attorney. Otherwise it is of a sole corporation.
But if executors or administrators be excommunicated, they may
be disabled; because they, which converse with a person excommu-
cate, are excommunicate also. [d] If a bishop be defendant, an
excommunication by the same bishop against the plaintife shall not
disable him, and it shall be intended for the same cause, if another
be not shewed.

10. H. 7. 8. & 9. 18. E. 3. 52. 28. E. 3. 97.
3. H. 4. 3.

16. E. 3. Excom. 5. 20. E. 3. ibid. 9.

[a] Bracton, lib.
5. fol. 415. 426,
427. Fleta, lib.
6. c. 44.
Britton, ca. 49.
fol. 125.
(F. N. B. 62.)
Doctr. Plac. 8.)
[*] F. N. B.
64. F.

[b] Bracton,
426. b. acc.

[c] 30. E. 3. 15.
42. E. 3. 13.
21. H. 6. 30.
21. E. 4. 49.

[d] See Artic.
Cleri, ca. 7.
5. E. 3. 8.
8. E. 3. 70.
9. H. 7. 21.

[e] Bracton, lib. 5. fo. 426. b. 12. E. 4. 15. 20. H. 6. 17. 20. E. 3. Excommengement 20. 33. E. 3. ibid. 29. 44. E. 3. ibid. 23. 11. H. 4. 14. F. N. B. 64, 65. 239. 7. E. 4. 14. 8. H. 6. 3. Registr. 67. (8. Co. 68. 1. Ro. Abr. 883.) [f] 11. H. 4. 62. in Debt. [g] 33. E. 3. Excom. 29. F. N. B. 65. (Dy. 371. b. 4. Inf. 327.) [b] 16. E. 3. Excom. 4. 31. E. 3. ibid. 4. & 6. 30. Aff. 19. F. N. B. 64. 4. H. 7. 15. 12. E. 4. 15. 14. H. 4. 14. [i] 14. E. 3. Excom. 8. 8. E. 2. ibid. 26. [k] Hil. 14. E. 3. Coram rege, London, in Thesaur. (Ante 97. a. Post. 344.) [l] 17. E. 3. fo. 40. 25. E. 3. cap. de Provisi. 25. H. 8. ca. 10. 3. Co. 73. le case dedeane & chapter de Norwich. Mat. Par. pag. 62. Vid. Sect. 133, 134. [m] Rot. Patent. 15. January, 17. Regis Johannis. Mat. Par. pag. 252. 35. E. 1. Lestat. de Carisle. 25. E. 3. Lestatut. de Provisi. 13. R. 2. ca. 2. [n] 25. H. 8. ca. 20. [o] 2. E. 3. Corone, 160. 8. E. 3. 59. 24. E. 3. 33. 44. E. 3. 28. 8. R. 2. Conusans 88. (2. Ro. Abr. 589.) [p] 41. E. 3. 42. E. 3. fo. 18. E. 3. 61. 14. H. 4. 25. 3. H. 4. 12. Registr. 7. a. F. N. B. 6. E.

“*Lettre del evesque south sen seale.*” [e] None can certifie excommengement but only the bishop, unlesse the bishop be beyond sea or *in remotis*; or one that hath ordinary jurisdiction, and is immediate officer to the king’s courts, as the archdeacon of *Richmond*, or the dean and chapter in time of vacation. [f] But in ancient time every official or commissary might testify excommengement in the king’s court; and for the mischief that ensued thereupon, it was ordained by parliament, that none should testifie excommengement but the bishop only.

[g] If a bishop certifie that another bishop hath certified him, that the partie which is his diocesan is excommunicated, this certificat upon another’s report is not sufficient. [b] If the bishop of *Rome*, or any other having foraigne authority, doth excommunicate any subject of this realm, and certifieth so much under his seale of lead, this shall not disable the party; for the common law disallowes all acts done in disability of any subject of this realm by any foraine power out of the realme, as things not authentique, whereof the judges should give allowance. [i] If the bishop certifieth the excommunication under seal, albeit he dyeth, yet the certificate shall serve. [k] *Si quis innodatus fuerit per excommunicationes diversas pro diversis delictis, et profert literas absolutionis de una sententia, non erit absolutus, quousque de omnibus aliis absolvatur.*

“*Evesque.*” *Episcopus*, a bishop, is regularly the king’s immediate officer to the king’s court of justice in causes ecclesiasticall, and all the bishopricks in *England* are of the king’s foundation, and the king is patron of them all; [l] and at the first they were donative, and so it appeares by our bookes, and by acts of parliament, and by history, and that was *per traditionem annuli & pastoralis baculi*, i. e. the crosier (1). And king *Henry* the first, being perswaded by the bishop of *Rome* to make them elective by their chapter or covent, refused it (2). [n] But king *John* by his charter acknowledging the custome and right of the crowne in former times, yet granted *de communi consensu baronum*, that they should bee eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbishops and bishops, as of the confirmation of the election and consecration, is [n] enacted and expressed in the statute of 25. H. 8. But by the statutes of 31. H. 8. and 1. E. 6. (3) they were made donative by the king’s letters patents, both which statutes are repealed (4), and the statute of 25. H. 8. doth yet remaine in full force and effect (5).

And where *Littleton* saith, that the bishop under his seale must testifie, &c. it is to be knowne, [o] that none but the king’s courts of record, as the court of common pleas, the king’s bench, justices of gaole delivery, and the like, can write to the bishop to certifie bastardy, mulierty, loyalty of matrimony, and the like ecclesiasticall matters; for it is a rule in law, that none but the king can write to the bishop to certifie; and therefore no inferiour court, as *London*, *Norwich*, *Yorke*, or any other incorporation, can write to the bishop, but [p] in those cases the plea must be removed into the court of

common

(1) [See Note 212.]

(4) [See Note 215.]

(2) [See Note 213.]

(5) [See Note 216.]

(3) [See Note 214.]

common pleas, and that court must write to the bishop, and then remand the record againe. And this was done in respect of the honor and reverence which the law gave to the bishop, being an ecclesiasticall judge, and a lord of parliament by reason of the baronie which every bishop hath. (1) And this was the reason [a] a *quare impedit* did not lye of a church in *Wales* in the county next adjoyning, for that the lordship's marchers could not write to the bishop: [b] neither shall consufance be granted in a *quare impedit*, because the inferior court cannot write to the bishop. And herewith agreeth antiquitie. [c] *Nullus alius præter regem potest episcopo demandare inquisitionem faciendam.* [d] And another speaking of loyaltie of marriage, *nec alius quàm rex super hoc demandaret episcopo, quòd inde inquireret.* *Episcopus alterius mandatum, quàm regis, non tenetur obtemperare.* And therewith agreeth Britton also.

"*Le briefe n'abatera, &c.*" *Abater* is a French word, and signifieth *destruere*, or *prostrare*, to destroy or prostrate. And *abatement de briefe* is a prostration or overthrowing of the writ.

[*] "*Alera quite sauns jour, &c.*" That is, to goe quiet without any continuance to any certaine day; and therefore the defendant is not bound to any certaine attendance, untill the party purchaseth his letters of absolution, and the reattachment or resommons bee sued, the entry of which award is, *ideo loquela prædicta remaneat sine die quousque, &c.*

"*Jour.*" *Dies*, [e] in legall understanding is the day of appearance of the parties, or continuance of the plea. And you shall understand, that first in reall actions there are *dies communes*, common dayes, whereof you shall reade in divers ancient statutes.

[f] Also in all summons upon the originall there must be fifteene dayes after the sommons before the appearance. [g] But if the originall be returned *tarde*, and *sommons alias* goeth forth, there must be nine returnes betweene the *teste* and the returne. And so in other judiciall processe in reall actions, saving if consufans be demanded to be holden within his mannor, there processe shall be awarded from three weekes to three weekes.

And before the statute of *articuli super chartas*, in all sommons and attachments in plea of land there shall be contained the terme of fifteene dayes. [q] And it appeareth as well by the statute as by the ancient authors of the law, who wrote before the statute, that this was the ancient common law; and the reason of these long dayes given in reall actions was the recovery being so dangerous, that the tenant might the better provide him both of answer and of proofes. [*] But by consent they may take other than common dayes.

And it is not amisse to note what the ancient law was in proceeding against a man for his life. And therefore heare what Britton saith: *Sur le presentment de cest felony* (under which he includeth also treason) *voilons nous* (for he wrote in the king's name) *que trestous ceux, que ent ferr' endites, face le viscont hastiment prender, et susement leur corps en prison garder, et que ilz' sont menus devant nous, ou devant nos justices: et pur ceo que nulluy ne soit disgarnis de leur respens,*

[a] 8. E. 3. 59.
36. H. 6. 33.
tit. Quar. Imp.
Brooke 109.
35. H. 6. 30.
11. H. 6. 3.
24. E. 3. 33.
[b] 15. E. 3.
Consufans 41.
Jurisdic. 24.
40. E. 3. 2.
Vide Sect. 134.
[c] Braçt. lib. 3.
106.
[d] Fleta, lib. 5.
cap. 14. Britton,
fol. 248. b.
[*] Braçt. lib. 5.
fol. 425.
11. R. 2. Excom.
25. 13. E. 4. 8.
3. Aff. p. 12.
Vide Sect. 691.

[e] 51. H. 3. cap.
1. & 2. Marlebr.
ca. 12.
32. H. 8. ca. 21.

[f] Articuli
super Cart. ca.
15. 28. E. 1.
[g] 8. H. 6. 20.
30. H. 6. 35.
8. Eliz. Dier 252.
(2. Inst. 567.)

[q] Mirror, cap.
2. sect. 19.
Braçt. lib. 5. fol.
334. & lib. 4.
fol. 255. Brit.
fol. 279. b.
Fleta, l. 6. c. 6.
12. E. 4. 15.
[*] 11. H. 6. 23.
15. E. 3. Jour 22.
21. E. 3. 29.
15. Aff.

Britton, fol. 10.
b.

(1) [See Note 217.]

[r] Fortescue in
libro de Laudibus
Legum Angliæ.
Mirror, ca. 4.
Sect. Sept
choses disturben
judgement mor-
tels.

[s] 9. Co. 118. b.
Zancher's case.
(2. Inst. 568.)

[a] Artic. super
Cart. ubi supra.

F. N. B. 177. c.

11. Aff. 30.

12. Aff. 4.

22. Aff. 79.

3. H. 6. Aff. 2.

9. E. 4. 5. a.

27. E. 3. 1.

2. W. 1. cap. ult.

[*] F. N. B. 177.

D. 7. Aff. 7.

14. Aff. 4.

24. E. 3. 31.

39. E. 3. 20.

9. E. 4. 18.

12. E. 4. 15.

8 H. 5. Error 87.

12. E. 4. 15.

[1] 41. E. 3.

Jour 16.

8 E. 4. 4.

1. H. 6. 4.

27. Aff. 33.

[c] 3. E. 2.

Avowrie 188.

15. E. 3. Jour 20.

22. E. 3. 20.

1. E. 3. 4.

9. Co. 49.

Countee de

Salop's case.

33. H. 6. 42.

[d] 14. E. 3.

Jour 24.

15. E. 3. ibid. 21.

22. E. 3. 9.

27. E. 3. 88.

[e] 22. E. 4.

Jour 39. 18. E. 3.

ibid. 20.

38. E. 3. 20.

9. Aff. 21.

21. E. 3. 13.

39. H. 6. 29.

*spons, voilons que ceux, que issint soient prise, que ilz eynt temps de pur-
veyer leur respons 15 jour au meyns filz le prient, et en dementiers soient
safement gardes.* [r] *Vide Fortescue of this matter.* And see the
Mirror, that in some cases the party convicted had forty dayes, or
at least thirty dayes to shew some matter to disturbe (that is, to ar-
rest) judgement, which now I know is gone in *desuetudinem*, and
great expedition is now made in pleas of the crowne concerning the
life of man. *Sed de morte hominis nulla est cunctatio longa.*

[s] And the use of the king's bench at this day is, that if the
offence be committed in another county than where the bench sits,
and the inditement be removed by *certiorari*, there must be fifteene
dayes betweene every proceffe and the returne thereof; but if it
be committed in the same county where the bench sit, they may
proceed *de die in diem*; but so they will doe rarely. But let us re-
turne againe to the common pleas.

Secondly, there is a day called *dies specialis*; [a] as in an assise
in the king's bench or common pleas, the attachment need not be
15 dayes before the appearance. Otherwise it is before justices
assigned. But generally, in assises, the judges may give a speciall
day at their pleasure, and are not bound to the common dayes;
[*] and these daies they may give as well out of terme as within.
So upon an imparlance the court may give any speciall or parti-
cular day, but that must be in the terme time; and likewise in a
scire facias, upon a fine or a recovery in a reall action, because it
is a writ of execution; and so it is in a *per quæ servitia* and the
like, and in all judiciall writs: in proceffe against an infant to judge
of his age, or where the husband prayeth in ayd of his wife, or in
a *pone* at the suit of the defendant, there need not be fifteene dayes.
Also after demurrer in law, the court may give what day they
will. [b] And it is worthy the noting, that if in an assise the par-
ties be adjourned to *Westm. usque 15 Pasche*, there they be not de-
mandable till the fourth day; but if it be adjourned *usque diem*
Lunæ, or *diem Martis*, there the parties are demandable on that
day.

Thirdly, [c] there is a day of grace, *dies gratia*, or a day of
courtesie. The name doth shew of what kind it is; and regularly
this day is granted by the court, at the prayer of the demandant
or plaintife in whose delay it is, and never at the prayer of tenant
or defendant. But it is worthy of observation, [d] that a day of
grace is never granted, where the king is party by aide prayer of
the tenant or defendant; nor where any lord of parliament or peere
of the realme is tenant or defendant. [e] And sometimes the day
that is *quarto die post*, is called *dies gratia*; for the very day of re-
turne is the day in law, and to that day the judgement hath rela-
tion: but no default shall be recorded till the fourth day be past,
unlesse it be in a writ of right, where the law alloweth no day, but
onely the day of returne. This day is sometimes called *dies amoris*,
and sometimes a *dies datus*. But it were too long to enumerate all.
This shall be sufficient to give the reader a taste to understand the
residue concerning this matter.

41. E. 3. ibid. 16. 33. H. 6. 42. 34. H. 6. 27. 10. Eliz. Dier 269.
24. E. 3. 28. 24. E. 3. Breve 556. Bract. lib. 5. fol. 367.

[f] 21. E. 3. 43.

3. H. 6. 2. a.

22. H. 6. 20.

[f] There is also a day of appearance in court by the writ, and
by the roll. By writ, when the sherife returns the writ. By the
roll,

roll, when he hath a day by the roll, and the sherife returnes not the writ, there the defendant, to save himselfe from corporall paine, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appeare by the day he hath by the roll.

[g] Note, it is said commonly, that the day of *nisi prius*, and the day in bank, is all one day. That is to be understood as to pleading, but not to other purposes.

There are *dies juridici* (which [b] Britton calleth *temps covenables*) and *dies non juridici*. *Dies juridici* (except it be in assises) are only in the tearme. [i] And there be also in the tearme *dies non juridici*. As in all the foure tearmes the sabbath day is not *dies juridicus*, for that ought to be consecrated to divine service. (1) Also in *Michaelmasse* tearme the feasts of *All Saints* and of *All Soules*; (2) in *Hillarie* tearme, the *Purification of the Blessed Virgin Marie*; and in *Easter* tearme the feast of the *Ascension* are not *dies juridici*, but set apart by the ancient judges and sages of the law for divine service. As for *Trinity* tearme, it sometimes had seven dayes of returne, and was as long as *Michaelmasse* tearme is now: but for avoiding of infection in that hot time of the yeare, and that men might not be letted to gather in harvest, three returnes (since *Littleton* wrote) viz. *Craftino Sancti Johannis Baptiste*, *Octabis Sancti Johannis Baptiste*, and 15 *Sancti Johannis Baptiste*, are by the statute of 32. H. 8. cut off, and become *dies non juridici*. And in those dayes the feast of *Saint John the Baptist* was not *dies juridicus*. And the said statute, called *Dies Communis in Banco*, is in divers points (since *Littleton* wrote) altered, as by the said statute appeareth. And in ancient time respect and reverence was had by law to certaine times, as it appeareth [k] by the statute of W. 1. cap. 51. which hath a short but an excellent preamble; viz. *Et pur ceo que grand charitie serra de faire droit a tous en tout temps, ou mestior serroit; purvieu est per assentment des prelates, que assises de novel disseisin, mortdauncester, et darreine presentment, fuissent prises en le Advent, en Septuagesime, et en Quaresme, auxibien come (le home) prent lenquestes: et ceo pria le roy as evesques.*

[l] This statute is expounded in bookes, which I have onely added, to the end the studious reader might understand the bookes that darkly speake of this matter, and be ignorant of nothing that belongs to the understanding of any part of the law. Now *Advent* is a moneth before the feast of the *Nativity of our Saviour Christ*, so called *de adventu Domini in carne*. *Septuagesima* beginneth ever on the sabbath day, and is the third sabbath before *Shrove Sunday*, so called, because it is the seventieth day before the feast of *Easter*. *Sexagesima* is the second sabbath before *Shrove Sunday*, so named, because it is the sixtieth day before *Easter*; and so of *Quinquagesima* and *Quadragesima*, [m] whereof you shall reade in acts of parliament, and ancient authors. (3) Now as there be *dies juridici*, so there be *horæ convenientes*, whereof the *Mirror* saith, [n] *abusio, que len tient pleas per dimenches (id est sabbaths) ou per auters jours defendus, ou devant le soleil levy, ou noëstantre, ou en dishonest lieu.*

Furthermore,

(1) [See Note 218.]

(2) [See Note 219.]

(3) See further, as to *dies non juridici*,

Spelman's Treatise on the Terms amongst his Poethuma, page 87.

3. E. 4. 15.
6. E. 4.
7. E. 4. 15.
8. E. 4. 18.
3. H. 7. 8.
10. H. 7. 11. b.
27. H. 8. 14.
11. Co. 40.
17. E. 3. 2.
11. Eliz. Dier
286.
[g] 21. H. 6. 10.
20. 4. H. 6. 9.
40. E. 3. 31.
(Cro. Jam. 646.)
[b] Britton, fol.
134. a.
(2. Inst. 264.)
[i] Mirror, cap.
3. sect. Exception
de Temps,
& cap. 5. sect. 1.
(Plowd. 265.
Cro. Cha. 602.
Cro. Eliz. 227.)
32. H. 8. cap. 21.
[k] W. 1. cap.
ultimo.
[l] 7. Aff. p. 7.
14. Aff. 5.
F. N. B. 177, &c.
Britton, fol.
134. b.
[m] W. 1. cap.
51. fait anno
3. E. 1. Britton,
fol. 134. ca. 53.
[n] Mirror, lib.
5. sect. 1.

[o] Bract. lib. 4.
fol. 264.
Britton, fol. 209.
(Cro. Eliz. 43.
1. Saund. 286.)

[o] Furthermore, there are (as ancient authors term them) *dies solaris et dies lunaris, secundum quod Deus di-vi-sit lumen à tenebris, ex quibus duobus diebus efficitur unus dies, qui dicitur artificialis, ex die præcedente et nocte subsequente, qui constat ex 24 horis.*

Gen. cap. 1.
ver. 4, 5.

But we at this day, retaining the same method, doe differ in words. For we say, *dierum alii sunt naturales, alii artificiales; dies naturalis constat ex 24 horis, et continet diem solarem et noctem: and therefore in indictments of burglary, and the like, we say, in nocte ejusdem diei. Iste dies naturalis est spatium, in quo sol progreditur ab oriente in occidentem, et ab occidente iterum in orientem. Dies artificialis seu solaris incipit in ortu solis, et definit in occasu:* and of this day the law of England takes hold in many cases. Now divers nations beginne the day at divers times. The *Jewes*, the *Chaldeans*, and *Babylonians*, beginne the day at the rising of the sunne; the *Atheneans* at the fall; the *Umbri* in *Italy* beginne at midday; the *Egyptians* and *Romanes* from midnight; and so doth the law of England in many cases. Of all which you shall reade plentifull matter in our bookes, and in my Reports, which by this short instruction you shall the better understand.

[p] Bract. lib. 5.
fol. 359.
Britton, fol.
209. a.
[q] 17. Eliz.
Dier 345.
(2. Ro. Abr.
521.)
[r] 21. H. 3.
stat. de anno bis-
sextili.

[p] There is also *annus minor* and *major*. The lesser yeare consisteth of 365 dayes and fixe houres, whereby in every fourth yeare there is *dies excrefcens*, which makes that yeare to have in rei [135. b.] veritate 366 daies, and that is called *annus major*. [q] A quarter of a year containeth by legall computation 91 dayes, and half a yeare containeth 182 days; for the odde hours in legall computation are rejected; and by [r] the statute *de anno bissextili*, it is provided, *quod computen. ur dies ille excrefcens et dies proxime præcedens pro unico die*, so as in computation that day excrefcens is not accounted. A month, *mensis*, is regularly accounted in law 28 dayes, and not according to the solar month, nor according to the kalendar [s], unlesse it be for the account of the laps in a *quare impedit*. There is *mensis solaris*, and *mensis lunaris*. *Solaris est 12 pars anni, viz. spatium 30 dierum horarum 10 et minutorum 30, et lunaris est spatium 28 dierum.*

[s] 6. Co. 62.
Cateby's case.
(2. Ro. Abr.
521. Cro. Jam.
167.)

“*Resommons ou re-attachment.*” These are writs that the demandant or plaintife, after he hath obtained his letters of absolution, may sue out to bring the tenant or defendant againe into court to have day, to make answer unto him. [t] And these writs doe lye in all cases when the plea is discontinued or put without day, either in this case, or in case when the demandant or tenant hath his age, or for the *non-venue* of the justices, or in case of a protection, or *essoine de service le roy*, &c. Of these writs there be two sorts, viz. generall and speciall, whereof you may see presidents, and reade more at large in the case of discontinuance of proceffe in my Reports, and need not here to be inserted.

[t] Bract. lib. 5.
fo. 425.
Britton, ca. 74.
7. Co. 29, 30.
(Post. 363. a.)

But in the case
of outlawry the
writ shall abate
if he obtaine not
his pardon.
4. E. 1. 27.

“*Sur son originall.*” This is intended of his originall writs, or of that which is instead of an originall writ. But note, that in the other five cases the writ shall abate; and in the case of excommungement the writ shall not abate, but the plea to be put without day, untill the plaintife purchase his letters of absolution, and sue out his resummons, or reattachement.

In ancient times more persons seemed to be disabled then these fixe recited by Littleton. As first, he that was a leper, and by the writ

writ de leproso amovendo was propter contagionem morbi prædicti (as the writ saith) et propter corporis deformitatem (as others say) to be removed from the society of men to some solitary place; and thereupon [u] it is said, datur etiam exceptio tenenti ex personâ petentis peremptoria propter morbum petentis incurabilem et corporis deformitatem; ut si petens leprosus fuerit, et tam deformis quòd aspectus ejus sustineri non possit, et ita quòd à communione gentium sit separatus, talis quidem placitare non potest, nec hereditatem petere. [x] And herewith Britton agreeth. Treating of disabled men, as men outlawed, abjured the realme, attainted of felony, &c. he addeth, ne mesel, ouste de common gents.

[u] Bract. lib. 5. fol. 421.

[x] Britton, fol. 39. & 88.

[y] And Fleta saith, competit etiam ei exceptio propter lepram manifestam, ut si petens leprosus fuerit, et tam deformis quòd à communione gentium meritò debet separari; talis enim morbus petentem repellit ab agendo.

[y] Fleta, lib. 6. cap. 39. 22. E. 3. in dorf. clau. 20. Part. nu. 14. F. N. B. 234. Register.

And if these ancient writers be understood of an appearance in person, I think their opinions are good law; for they ought not to sue nor defend in proper person, but by attorney; for they are separated à communione gentium propter contagionem morbi et deformitatem corporis.

Before the Conquest this disease was not known in England; for master Camden, writing of Burton Lazars in Leicestershire, saith, [a] primis Normannorum temporibus collecta per Angliam stipe nosocomium hoc constructum fuerunt, quo tempore lepra (quæ à nonnullis elephantiasis) gravissimè vi contagionis per Angliam serpsit. And it is called morbus elephantiasis, because the skinnies of lepers are like to elephants. [b] And the law of England, for the removing of the lepers from the society of men to some solitary place, is grounded upon God's law.

[a] Camden in Leicestershire, verbo Burton.

[c] Also there was a time when ideots, madmen, and such as were deafe and dumbe naturally, were disabled to sue, because they wanted reason and understanding (tales enim non multùm disant à brutis). But at this day they all may sue; for the suit must be in their name, but it shall be followed by others. [d] And note, that when an ideot doth sue or defend, he shall not appeare by gardian or procheine amy, or attorney, but hee must bee ever in person; [e] but an infant, or a minor, shall sue by procheine amy, and defend by gardian. (1) But now let us heare what Littleton will say unto us.

[b] Levit. cap. xiii. verse 44, 45, 46. Numer. cap. v. verse 1, 2. iv. Regum, c. 15. [c] Bract. l. 5. 420, 421. Britton, f. 39. Fleta, l. 6. c. 37. [d] 33. H. 6. 18. F. N. B. 27. G. [e] 27. H. 8. 11. 40. E. 3. 16. 20. E. 4. 2. F. N. B. 27. H. (2. Inst. 261.)

Sect. 202.

136. a.] **I**TEM, si un vilain est fait un chapleine seculer, uncore son seignior poit luy seiser come son vilain, et seiser ses biens, &c. Mes il semble, que si le vilain entre en religion, et est professe, que le seignior ne poit luy prendre ne seiser, pur ceo que il est mort en ley; nient

ALSO, if a villeine be made a secular chaplaine, yet his lord may seise him (2) as his villeine, and seise his goods, &c. But it seemeth, that if the villeine enter into religion, and is professed, that the lord may not take nor seise him, because he is dead

(1) [See Note 220.]

(2) Vide tamen Pasch. 8. E. 1. rot. 7.

the case of Edward Rowald contra.—Hail. MSS.

nient pluis que si un frank home prent un niese a sa feme, le seignior ne poit prendre ne seiser la feme de le baron, mes son remedy est d'aver un action envers le baron, pur ceo que il prist sa niese a feme sans son licence et volunt, &c. Et issint poit le seignior aver action envers le soveraign del meason, que prist et admittast son villein d'estre professe en mesme le meason, sans licence et la volunt le seignior, et recoversa ses damages a la value de le villein. Car celui que est professe moigne, serra un moigne, et come un moigne serra pris pur terme de sa vie natural, sinon que il soit deraigne per la ley de saint esglise. Et il est tenu per son religion de garder son cloister, &c. Et si le seignior luy puisset prendre hors de sa meason, donques il ne viveroit come un mort person, ne solonque son religion, le quel ferroit inconvenient, &c.

dead in law; no more than if a free man taketh a niese to his wife, the lord cannot take nor seise the wife of the husband, but his remedy is to have an action against the husband, for that he took his niese to wife without his licence and will, &c. And so may the lord have an action against the soveraign of the house, which taketh and admitteth his villeine to be professed in the same house, without the licence and leave of the lord, and he shall recover his damages to the value of the villeine. For he which is professed a monke, shall be a monk, and as a monke shall be taken for terme of his naturall life, unlesse he be deraigned by the law of holy church. And he is bound by his religion to keepe his cloyster, &c. And if the lord might take him out of his house, then he should not live as a dead person, nor according to his religion, which should be inconvenient, &c.

[a] Mirror, cap. 2. sect. 18. Doct. & Stud. fol. 141. 4. E. 4. 25. per Danby. 27. Aff. pl. 49. [b] Britton, cap. 31. fol. 79. Doct. and Student, fo. 141. (Doctr. Plac 9. Ante 132. a.) 4. H. 4. cap. 14.

“**CHAPLEINE** [a] *secular*” is he that is *infra sacros ordines*; but he is not regular, (that is) liveth not under certaine rules, nor hath vowed those three things above specified.

[b] “*Enter en religion, et est professe.*” That is intended (as hath been said) when he is regular and professeth under certain rules, as to become one of the foure orders of friers (that is to say) *freres Minors, Augustines, Preachers, or Carmelites*, or become a monke, canon, or nunne, &c. *Qui ad vivendum regulariter se astringunt, sive sunt monachi, sive canonici regulares sive sanctimoniales.* For all these are regular and votaries, and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, &c.

[c] 21. H. 7. 39. 19. H. 7. tit. Bastardy 33. 5. E. 2. tit. Nonobilit 26. 47. E. 3. Casu. ult. (12. Co. 9. 1. R. Abr. 340.)

And therefore it is holden in our bookes, [c] that if a secular priest taketh a wife, and hath issue and dyeth, the issue is lawfull, and shall inherite as heire to his father, &c. for (as it was then holden) the marriage was not void, but voidable by divorce, and after the death of either partie no divorce can be had (1).

But if a man marieth a nunne, or a monke marieth, these marriages were holden void, and the issues bastards; because (as it was then holden) the marriage was utterly voyde, for that the nunne and the monke (as *Littleton* here saith) were dead persons in law. And that is the reason yeelded by *Littleton*, wherefore a villeine, being professed in religion, cannot be seised by the lord, because he is dead in law; and yet his blood or bondage is not thereby altered, but his person in respect of his profession only privileged. [d] *In decretalibus*

[d] Glanvil. lib. 5. cap. 5. Britton, fo. 79. & 82.

decretalibus statutum est, quòd nullus episcopus spurios aut servos, donec à dominis suis fuerint manumissi, ad sacros ordines promovere præsumat. But notwithstanding his person is privileged till he be disgraded. And so it is holden in our old bookes. [e] If a villeine be made a knight, for the honour of his degree his person is privileged, and the lord cannot seise him untill he be disgraded. *Nul- lam vilem personam natione spurium, vel servilis conditionis, ad militiæ strenuitatis ordinem promoveri licebit; sed cum à dominis suis petantur ut nativi, ipsis primò degradatis, statim ad judicium procedatur.*

136. b.]

[e] Fleta, lib. 2. cap. 44. Britton, ubi supra.

“*Si un frank home prent un niese.*” [f] Some have holden, that by this marriage the wife shall be free for ever; but the better opinion of our bookes is, that shee shall be privileged during the coverture onely, unlesse the lord himself marrieth his niese; and then some hold, that she shall be free for ever (1)

[f] F. N. B. 78. b. 30. E. 1. tit. Villein 46. 33. E. 3. ibid. 21. (Post. 137. b.) 18. E. 2. ibid. 30. 46. E. 3. 6. 4. E. 4. 25. 1. H. 4. 6. 13. E. 1. Villein 36. 18. Aff. 10. Doct. & Stud. 141. Mirror, ca. 2. sect. 18. acc. [g] 16. H. 3. nuper obiit 17. 8. H. 3. Breve 789.

If a niese be regardant to a mannor, and she taketh a freeman to husband by licence of the lord, and the lord maketh a feoffment in fee of the manor, the husband dieth, the feoffee shall not have the niese, but the feoffor, for that during the marriage she was severed from the mannor. And so is the booke 29 Aff. (which is falsly printed) to be understood.

[g] If two coparceners be of a villeine, and one of them taketh him to husband, she and her husband shall not have a *nuper obiit* against her coparcener, but after the decease of her husband she shall.

“*[b] Mes son remède est d'aver un action vers le baron, &c.*” Albeit marriage is lawfull, yet when it worketh a prejudice to a third person, an action in this case lyeth against the husband to the value of his losse. And albeit he did not know her to be a niese, yet the action lyeth against him; for he must take notice thereof at his perill, [i] unlesse she be out of the service of the lord, and vagrant; and then if one not knowing her to be a niese marieth her, some say, that in that case no action lyeth against the husband. [k] And likewise the lord shall have an action against those that were the meanes to make the villeine a knight.

[b] Vide Britton, fol. 82. Fortesc. c. 43. 46. E. 3. 6. a. [i] 7. R. 2. tit. Barre 240. (F. N. B. 168. b. 1. Leon. 240.) [k] Britton, fol. 82. b.

“*Sovereigne,*” *præcipuus, chiefe*; as here, *sovereigne del meason*, is the chiefe of the house.

31. H. 6. ca. 5. 12. H. 7. c. 7. 11. H. 4. 5. b.

“*Sinon que'il soit deraigne.*” This word (*deraigne*) commeth of the French word *derayer*, or *deraigner*; that is to say, to displace or to turne one out of his order; and hereof cometh *deraignment*, a displacing or turning out of his order. So when a monke is deraigned, he is degraded and turned out of his order of religion, and become a lay man.

31. H. 8. cap. 29.

“*Le quel serroit inconvenient.*” *Ab inconvenienti* is a good argument in law, as *Littleton* often observeth. And here *Littleton* concludeth, that the lord cannot take a monke out of his house, for that it should be inconvenient, which *Littleton* here sheweth, for divers

40. Aff. 27. per Finchden.

(1) See ante 123. n. 3. Post. 137. b.

divers reasons, and therefore unlawfull. And the inconvenience is, that where a man of religion should live according to his profession in religion, by the taking of him out he should not.

“ *Si le seignior luy puiſſoit, prendre, &c.*” By this it appeareth, that if a man detaineth a villeine in his house, the lord of the villeine may take him out of the house; for here the impediment, wherefore the lord could not take him out of the house, was, for that the villeine was a monke professed. And so in case of the wardship here next following.

Sect. 203.

EN mesme le manner est, si soit gardeine en chivalrie de corps et de terre d'un enfant deins age, si l'enfant, quant il vient al age de 14 ans, entra en religion, et est professe, le gardein n'ad auter remedy (quant a le garde de le corps) forsque breve de ravishment de garde envers le soveraigne de le meason. Et si ascun esteant de plein age, que est cosin et heire del enfant, enter en le terre, le gardein n'ad ascun remedie quant al garde de la terre, pur ceo que l'entrie del heire l'enfant est congeable en tiel case.

IN the same manner it is, if there be a gardeine in chivalry of the body and land of an infant within age, if the infant, when he comes to the age of 14 yeares, entreth into religion, and is profest, the gardian hath no other remedy (as to the wardship of the body) but a writ of ravishment de gard against the soveraign of the house. And if any being of full age, who is cousin and heire of the infant, entreth into the land, the gardian hath no remedy as to the wardship of the land, for that the entry of the heire of the infant is lawfull in such case.

“ **B**R I E F F E de ravishment de garde.” This writ is given by the statute of *W. 2. cap. 35. in verbis conceptis*; the words of which writ be, that the defendant, *talem hæredem, cujus maritagium ad ipsum A. pertinet, &c. rapuit et abduxit, &c. contra pacem.* Now *rapere* signifieth properly to take away by violence and force. And when the soveraign took and admitted the ward into his house to be professed, this in judgement of law is a ravishment of the ward; and as it appeareth in our bookes before the said statute, there lay a general action of trespas in that case.

[137. a.]

Co. Doctor
Hussey's case,
fol. 72.

“ *Après l'age de 14 ans, &c.*” Our author mentioneth this age, because it is prohibited by the statute of *4. H. 4. cap. 17.* that no childe shall be received into any house of religion before that age without consent of his parents and gardians, &c.

“ *Le gardein n'ad ascun remedie, &c.*” Here it appeareth, that, by the profession of the ward, the lord loseth the wardship of the land, because he is *civilliter mortuus*, a dead man in law, and cannot hold any inheritance; neither can the gardian continue the wardship of the land, because by the civill death of the ward the inheritance is descended to another, who is either to be in ward, or pay reliefe. So as in this case the gardian hath *damnum*, but it is *abique*

absque injuriâ, because he loseth the wardship of the land by act of law, viz. the descent thereof to another; and therefore the law giveth to him no remedy in this case, neither by any formed writ, nor by action upon his case; for *Littleton's* words are generall (he hath not any remedy).

Sect. 204.

ITEM, en multis et divers casēs le seignior poit faire manumission et enfranchisement a son vellein. Manumission est properment, quant le seignior fait un fait a son vellein de luy enfranchiser per hoc verbum (*manumittere*), quod idem est quod extra manum vel extra potestatem alterius ponere. Et pur ceo que per tiel fait le vellein est mis hors de la main et de la poier son seignior, il est appell' manumission. Et issint chescun maner de enfranchisement fait a un vellein poest estre dit manumission.

AL S O, in many and divers casēs the lord may make manumission and enfranchisement to his villeine. Manumission is properly, when the lord makes a deed to his villeine to enfranchise him by this word (*manumittere*), which is the same as to put him out of the hands and power of another. And for that that by such deed the villeine is put out of the hands and out of the power of his lord, it is called manumission. And so every maner of infranchisement made to a villein may be said to be a manumission.

“**MANUMISSION,**” [1] *Manumittere, quod idem est quod extra manum vel potestatem ponere.*

Quia quamdiu quis in servitute est, sub manu et potestate domini sui est.

Qui in potestate domini sui est, in manu domini sui esse dicitur; sed postquam manumissus est, ab illo liberabitur, ergo dicitur quasi extra manum, id est, extra potestatem domini sui missus. And here is to be noted (as in many other places is observed) what regard *Littleton* hath to the true etymologies of words.

[1] *Glanvill. lib. 5. cap. 5. Britton, fol. 78, &c. 82. 97. 110. Fleta, lib. 3. cap. 13. & lib. 2. cap. 44.*

[137. b.] “**[m] Enfranchisement.**” (Hereby *Littleton* explaineth manumission). It is derived from the French word *franchise*, that is, liberty; and in the common law it hath divers significations: sometimes the incorporating of a man to bee free of a company or body politique, as a free man of a city, or burgesse of a burrough, &c. sometimes to make an alien a denizen; and here to manumise a villeine or bondman. So as this word (*enfranchisement*) is more general than *manumission*; for that is properly applyed to a villein; and therefore every manumission is an infranchisement, but every infranchisement is not a manumission. [n] There be two kindes of manumissions, one expresse, and the other implied. Expresse, when the villeine by deed in expresse words is manumised and made free. The other implied, by doing some act that maketh in judgement of law the villein free, albeit there be no expresse words of manumission or enfranchisement. [o] If a villein be manumised, albeit he become ingratefull to the lord in the highest degree, yet the manumission remaines good: and herein the common law differeth from the civill law, for *libertinum ingratum leges civiles in pristinam*

[m] *Mirror, ca. 2. sect. 18.*

[n] *Mirror, cap. 2. sect. 18.*

[o] *Fortescue, cap. 46.*

pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.

There be also some cases where the villein shall be privileged from the seisure of the lord, albeit he be not absolutely manumitted or enfranchised. Sometimes *ratione loci*; [*p*] as if a villeine remaine in the ancient demeane of the king a yeare and a day without claime or seisure of the lord, the lord cannot have a writ of *nativo habendo*, or seise him, so long as he remaines and continues there; and the reason of this was, in respect of the service he did to the king in plowing and tillage of the demeane, and other labours of husbandry for the king's benefit. And herewith agree old bookes, [*q*] which say, that this immunity was sometimes granted by common consent to the king for his profit, and for the help or ease of his villeins. [*r*] If a villein be a priest of the king's chappel, the lord cannot seise him in the presence of the king, for the king's presence is a privilege and protection for him. Sometimes *ratione professionis*; [*s*] as if a villeine be professed a monke, or a niese a nun, as hath been sayd. [*t*] Sometimes (as some have said) *ratione dignitatis*; as if the villeine be made a knight, &c. Sometimes *ratione matrimonii*; as if a niese marry a free man, she is privileged during the marriage, but not absolutely enfranchised; for if her husband dye, she is niese againe, unlesse the lord himself marrieth the niese, and then she is enfranchised for ever, as hath been said before. (1) And it shall not be amisse to observe the wisdom of our ancients, with what solemnity (for more surety thereof) manumissions were made. *Qui servum suum liberat, in ecclesiâ, vel mercato, vel comitatu, vel hundredo, coram testibus et palam faciat, et liberas ei vias, et portas conscribat apertas, et lanceum et gladium, vel quæ liberorum arma, in manibus ei ponat.* Our author having spoken of an expresse manumission, here followe enfranchisements in law,

Sect. 205.

AUXI, si le seignior fait a son villeine un obligation de certaine somme d'argent, ou grante a luy per son fait un annuity, ou lessa a luy per son fait terres ou tenements par terme des ans, le villeine est enfranchise.

AL S O, if the lord maketh to his villeine an obligation of a certaine sum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for terme of yeares, the villeine is enfranchised.

[5. Co. 56. a.)

FOR when the lord enableth the villeine to have an action against him, as for debt or annuity, &c. or giveth to the villeine a certaine and fixed estate in lands, tenements, or hereditaments, as a lease for yeares, this amounteth to an enfranchisement, not only during the yeares, but for ever; [*u*] and albeit the lease be made to the villeine without deed, yet it is an enfranchisement for ever.

[*u*] 50. E. 3. tit. Vil. 25.

11. H. 7. 13.

(1) Ante 123. a. n. 3.

[138. a.]

Sect. 206.

AUXY, si le seignior fait un feoffment a son villeine d'ascun terres ou tenements, per fait ou sans fait, en fee simple, fee taile, ou pur terme de vie ou ans (1), et a luy livra seisin, ceo est un enfranchisement.

ALSO, if the lord maketh a feoffment to his villeine of any lands or tenements, by deed or without deed, in fee simple, fee taile, or for terme of life or yeares, and delivereth to him seisin, this is an enfranchisement.

This is evident, and agreeth with our bookes.

Vide 24. E. 3. 32.
12. H. 3. tit.
Vill. 42.

Sect. 207.

MES si le seignior fait a luy un lease des terres ou tenements, a zener a volunt le seignior, per fait ou sauns fait, ceo n'est ascun enfranchisement; pur ceo que il n'ad ascun manner de certainty ne suertie de son estate, mes le seignior luy poit ouster quant il voilt.

BUT if the lord maketh to him a lease of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchisement; for that he hath no manner of certainty or surety of his estate, but the lord may oust him when he will.

“**PER fait.**” So as a deed made to a villeine by the lord is no infranchisement, when the deed transferreth no certaine or fixed estate, but revocable at the lord's will. If the lord release to his villeine all the right in *Black Acre*, and the villeine is not thereof seised, this is no infranchisement, because it is voyd, and can give no cause of action. If the lord attorneth to his villeine, 11. H. 7. this is no infranchisement.

Sect. 208.

AUXY, si le seignior fust envers son villein un præcipe quod reddat, s'il recover, ou soit nonsue apres appearance, ceo est un manumission, pur ceo que il puisse loyallyment enter en la terre sans tiel suit. En mesme le manner est, s'il fust envers son villeine un action de debt ou d'accout, ou de covenant, ou de trespassse, ou de hujusmodi, ceo est un enfranchisement, pur ceo que il puisse emprison le villein, et prendre

ALSO, if the lord sueth against his villeine a præcipe quod reddat, if he recover, or be nonsuite after appearance, this is a manumission, for that he might lawfully have entred into the land without suit. In the same manner it is, if he sue against his villeine an action of debt or account, or of covenant, or of trespassse, or of such like, this is an infranchisement, for that he might imprison the villeine,

(1) The words *ou ans* not in L. and M. Roh. nor P. They first appear in Redm.

prendre ses biens sans tiel suit. Mes si le seignior fust son villeine per appeale de felony, ou il fuit endict de ceo devant, (1) ceo ne enfranchisera pas le villeine, coment que le matter de l'appeale soit trove encounter le seignior, pur ceo que le seignior ne puisse aver le villein d'estre pendue sans tiel suit. Mes si le villeine ne (2) fuit endict de mesme le felony devant l'appeale sue envers luy, et puis est acquite de cest felony, issint que il recouvrera dammages envers son seignior pur le faux appeale, donques le villeine est enfranchise, pur le cause de le judgement de dammages a luy d'estre done envers son seignior. Et plusors autres cases et matters y sont, per queux un villein poit estre enfranchise envers son seignior, &c. Sed de illis quære (3).

villeine, and take his goods without such suite. But if the lord sue his villeine by appeale of felony, where he was indited of the same before, this shall not enfranchise the villeine, albeit that the matter of appeale be found against the lord, for that the lord could not have the villeine to be hanged without such suit. But if the villeine were not indited of the same felony before the appeal sued against him, and afterward is acquitted of this felony, so as he recover dammages against his lord for the false appeale, then the villeine is enfranchised, because of the judgment of dammages to be given unto him against his lord. And many other cases and matters there be, by which a villeine may be enfranchised against his lord, &c. But enquire of them,

“*S* I seignior fust envers son villeine un præcipe quod reddat, &c. ceo est un manumission.” And the principall reason hereof is, for that by this suit he enableth the villeine to be a person able to render him the land by course of law, where the lord without any such suit might have entred. [a] But if the tenant in taylor be of a manor wherunto a villeine is regardant, and enfeofeth the villein of the manor, and dyeth, the issue shall have a *formedon* against the villeine, and after the recovery of the manor he shall seise the villein. And the reason is, for that he could not seise the villeine till hee had recovered the manor, which was the principall, and at the time of the writ brought he was no villeine.

[138. b.]

The tenant infeoffes the villeine of the lord and an estranger upon collusion: in this case, although the lord may enter upon the villeine for the moiety, yet may he have a writ of ward against them both without enfranchisement of the villeine; for if the lord should enter upon the villeine, then should his seigniory be suspended, and then could not he have a writ of ward against the other.

The lord, upon a writ of covenant brought by the villeine, levies a fine to his villeine of land which is ancient demesne; the lord of whom the land is holden reverseth the fine in a writ of deceit; albeit the authority and jurisdiction of the court is disproved, and that the lord of the villeine shall be restored to the land given by the fine, yet is it an enfranchisement, for that he answered to the writ of covenant, and the fine was voydable, and not voyde; and therefore, being once an enfranchisement, it cannot be avoided by the reversing of the fine.

“ Soit

(1) *Ou il fuit endict de ceo devant* in Red. and M. nor P.
but not in L. and M. Roh. nor P.

(2) *ne* in Roh. and Red. but not in L. Roh.

(3) *de illis quære* not in L. and M. nor

[a] 24. E. 3.
Discont. 16.
Vid. Britton. 78.
& 126.

(Ante 122. b.
2. Ro. Rep. 409.)

“*Soit nonsue (id est) non est prosecutus breve suum.*” For by the law the plaintife is first agent at every continuance; and therefore the record sayth, *quod petens seu querens* (naming them) *obtulit se*, who if he bee called, and make default, then he is said to be nonsuit, *id est, non est prosecutus, &c.*

By *Littleton* here it appeareth, that there is a nonsuite before appearance at the returne of the writ, or after appearance at some day of continuance. [x] The difference between a nonsuit and a

[x] 8. Co. 58. 62.
Becher's case.
3. H. 6. 13.
Brooke tit.
Nonsuit 1.
8. H. 6. 7.
50. E. 3. 12.

retraxit on the part of the demandant or plaintife is this. A nonsuite is ever upon a demand made, when the demandant or plaintife should appeare, and he makes a default. A *retraxit* is ever

[y] Tr. 5. H. 6.
Rot. 320. in
Com. Banco.

when the demandant or plaintife is present in court (as regularly he is ever by intendment of law, untill a day be given over, unlesse it be when a verdict is to be given, for then he is demandable.) And this is in two sorts, one privative and the other positive. Privative, as upon demand made, that he make default, and depart in despite of the court; and then the entry is, [y] *et postea*

eodem die revenit ad barram prædictæ tenens, et præd' petens tunc solenniter exactus non venit, sed à sectâ suâ prædictâ in contemptum curiæ se retraxit, ideo consideratum est, &c. Positive, as when the entry is, *et super hoc idem quærens dicit, quod ipse non vult ulterius placitum suum prædictum prosequi, sed abinde omnino se retraxit, ideo, &c.* Another form thereof is, *quod idem quærens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædict' defend', &c. de placito prædicto.* [z] A departure in despight of the court is on the

[z] F. N. B. 78.
f. & 108. d.
19. E. 2.
Villein 31.

part of the tenant, and is, when the tenant or defendant after appearance and being present in court upon demand makes departure in despight of the court, and then the entry is, *et prædict' tenens seu defendens licet solenniter exactus non revenit, sed in contemptum curiæ recessit et defaultam fecit, ideo, &c.* It is called a *retraxit*, because that word is the effectual word used in the entry, as before it appeareth, and it is ever on the part of the demandant or plaintife.

[a] Another difference betweene a *retraxit* and a nonsuit is, that a *retraxit* is a barre of all other actions of like or inferior nature: *qui semel actionem renunciavit, amplius repte non potest.* But regularly a nonsuit is not so, but that he may commence an action of like nature, &c. againe. For it may be, that he hath mistaken somewhat in that action, or was not provided of his proofes, or mistaking the day, or the like. But yet for some special reasons, nonsuit in some actions is peremptory.

[a] 8. Co. ubi
supra.

In a *quare impedit*, if the plaintife be nonsuite after appearance, the defendant shall make a title, and have a writ to the bishop; [b] and this is peremptory to the plaintife, and is a good barre in another *quare impedit* (1); and the reason is, for that the defendant had by judgement of the court a writ to the bishop, and the incumbent, that commeth in by that writ, shall never be removed, which is a flat barre as to that presentation; and of this opinion is *Littleton* in our bookes. And the same law, and for the same reason, it is in the case upon a discontinuance.

[b] 5. E. 3. 35.
2. H. 5.
31. H. 6. 15.
22. H. 6. 44, 45.
33. H. 6. 1. 55.
19. E. 4. 9.
21. E. 4. 2. b. & c.
F. N. B. 38. k.
7. Co. 27. b.
Sir Hugh Portman's case.

[c] In a writ *de nativo habendo*, nonsuit after appearance is peremptory; for thereby the villeine is enfranchised. And so it is if two be plaintifes in a *nativo habendo*, if one be nonsuit, this is the nonsuit of both, and no summons and severance doth lie in that

[c] 6. E. 2. Vill.
26. 12. E. 2. ibid.
28. 19. E. 2.
ibid. 31.
F. N. B. 78. e.
4. E. 2. Nonsuit
29.

case,

case, albeit it be a reall action. And this is, *in favorem libertatis*; for in a *libertate probandâ* nonsuit after appearance is not peremptory, neither is the nonsuit of the one the nonsuit of both.

[d] Nonsuit in an appeale of murder, rape, robbery, &c. after appearance is peremptory; and this is *in favorem vitæ*; for if the defendant be acquitted, and take out proceſſe upon the statute of *W. 2.* against the abettors, or if he purchase his originall writ, for that cause he may be nonsuit.

[e] If the plaintife in an appeale of mayhem be nonsuit after appearance, it is peremptory; for the writ saith, *felonice maihemavit*, and therefore the nonsuit is peremptory.

[f] In an attaint, if the plaintife after appearance be nonsuit, it is peremptory; and the reason is, for the saith that the law gives to the verdict, and for the terrible and fearefull judgement that should be given against the first jury if they should be convicted; and therefore upon the nonsuit, the plaintife shall be imprisoned, and his pledges amerced. But if the proceſſe in an attaint be discontinued, the plaintife may have another writ of attaint, because upon the nonsuit there is a judgement given, but not upon the discontinuance. *Note*, it is truly said, that *exceptio probat regulam*; for these cases excepted stand upon their special and particular reasons, and fall not within the general reason of the rule. It is a general rule, that nonsuite before appearance is not peremptory in any case, for that a stranger may purchase a writ in the name of him that hath cause of action, as shall be said hereafter in this Section.

[g] In reall or mixt actions the nonsuit of one demandant is not the nonsuit of both, but he that makes default shall be summoned and severed; but regularly in personall actions, the nonsuit of the one is the nonsuit of both, unless it be in certaine particular cases.

[h] In personall actions brought by executors there shall be summons and severance, because the best shall be taken for the benefit of the dead. And so it is in an action of trespassse, as executors for goods taken out of their owne possession. Like law in account as executors by the receipt of their owne hands.

[i] In an *audita querela* concerning the personalty, the nonsuite of the one is not the nonsuit of the other, because it goeth by the way of discharge and freeing of themselves, and therefore the default of the one shall not hurte the other.

[k] In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both, because the tenant cannot attorne according to the grant.

[l] Some actions follow the nature of those actions whereupon they are grounded; as the writs of error, attaint, *scire facias*, and the like. If a reall action be brought by severall *præcipes* against two or more, if the demandant be nonsuite against one, he is nonsuite against all; for as to the demandant it is but one writ under one *teste*. *Note*, severance is two-fold, viz. by summons *ad sequendum simul*, and that is when one of the demandants or plaintifes never appeared; and by award of the court of nonsuit without any summons, and that is after appearance.

[d] 9. H. 4. 1.
12. Stanf. Pl.
Cor. 148. a. &
171. c. 22. Aff.
97. Fitz. Cor.
184. 22. E. 3. 6.
47. E. 3. 16.
7. H. 7. 5.
40. E. 3. Dam.
77. 17. E. 2.
Coron. 386.
3. E. 2. Action
fur l'estat 28.
[e] 43. Aff. 39.
40. Aff. 1.
(1. Sid. 32.)
[f] 32. Aff. 13.
19. Aff. 13.
20. E. 3. Attaint
42. 22. E. 3. 7.
F. N. B. 108. d.

[g] 11. H. 6.
23. 35.
F. N. B. 35. b.
19. E. 3. un.
Sever. 14.
3. E. 2. Nonsuit
38. E. 3. 35.
10. Co 134.)

[h] 42. E. 3. 13.
48. E. 3. 14.
28. H. 6. 3.
11. E. 2. Sev. 26.
13. E. 3. ib. 15.
18. E. 3. ib. 28.
5 E. 3. ibid. 20.
7. E. 3. 12.
[i] 15. E. 3.
Sever. 23.
6. Co. 25. Rud-
dock's case.
[k] 20. E. 3.
Severance 17.
[l] 47. E. 3. 6. b.
47. Aff. 3.
29. Aff. 34.
7. H. 4. 45.
34. H. 6. 31.
25. H. 6. 19.
29. E. 3. 37.
6. Co. ubi supra.
22. H. 6. 42.
4. E. 4. 33.
19. E. 2.
Nonsuit 32.
38. E. 3. 9.

18. E. 3. ibid. 31. 20. E. 3. ib. 26, 27. 19. E. 3. ibid. 12. 3. E. 3. ibid. 17.
20. H. 6. 45. 44. E. 3. 16. 19. E. 3. Severance 16. (1. Sid. 378.)

[m] The king's majesty cannot be nonsuited, because in judgement of law he is ever present in court; but the king's attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuite. But in an information by an informer, *qui tam*, &c. the informer may be nonsuited.

[n] At the common law, upon every continuance or day given over before judgement, the plaintife might have been nonsuited; and therefore before the statute of 2. H. 4. after verdict given, if the court gave a day to be advised, at that day the plaintife was demandable, and therefore might have been nonsuit, which is now remedied by that statute.

[o] But after demurrer in law joyned, if the court doth give a day over, at that day the demandant or plaintife is demandable, and therefore may be nonsuit, for that is not holpen by any statute.

[p] And after an award to account, the plaintife may be nonsuit; and so note a diversity betweene an interlocutory award of the court, and a final judgement (1).

By these few instructions you shall the more easily understand the bookes of tearmes and yeares, and other authorities of law. And here (to returne to *Littleton*) it is to be noted, that, albeit the lord be nonsuit, yet the infranchisement of the villeine doth remaine, for that grew by the appearance to the writ, and cannot be taken away by the nonsuit subsequent. So it is if the writ do abate, yet the infranchisement remaines.

[q] "*Après appearance.*" For otherwise a stranger may purchase a writ in his name; and therefore *Littleton* materially added these words after appearance.

"*Præcipe.*" There be three kinds of *præcipes*. 1. A *præcipe quòd reddat*, whereof *Littleton* here speaketh; 2. a *præcipe quòd permittat*; and 3. a *præcipe quòd faciat*, whereof you may read plentifully in the *Register* and *Fitzherbert's Natura Brevium*, and belongs not properly to this treatise.

"*Account.*" Of this sufficient hath beene said before.

"*Covenant.*" *Conventio*. Hereof there be two kinds, viz. a covenant personall, and a covenant reall; and a covenant in deed, and a covenant in law.

"*Ou il fuit endite de ceo.*" [r] For if the villeine be not first indited of it, then, upon the acquittall of the villeine, the villeine shall recover damages against the lord by the statute of W. 2. *Quia nulli per malitiam*, &c. and consequently shall be enfranchised. But if the villeine be formerly indited of the felony, then though the villeine be acquitted upon the appeale, he shall recover no damages against the lord. For wheresoever the lord giveth to the villeine a just cause of action, he is enfranchised. [s] And therefore if the lord kill his villeine, his sonne and heire shall have an appeale, and thereby his heire shall be enfranchised, because the offence of the lord gave to the heire a just cause of action against the lord.

[m] 6. R. 2. Nonsuit 13.
25. H. 8. Nonsuit Br. 68.
20. H. 7. 5.
(2. Ro. Abr. 130, 131.
Post. 227. b.)
[n] 2. H. 4. ca. 7.
3. E. 3. 21.
47. E. 3. 1, 2.
3. E. 4. f. 11.

[o] 2. H. 5. 5.
8. R. 2. Nonsuit 34.
[p] 9. H. 7. 1.
21. E. 3. 32.
11. Co. 39. 41.
Metcalf's case.
(2. Ro. Abr. 131. contra.)

[q] 7. H. 4. 8.
11. H. 4. 13.
9. E. 4. 23.
7. H. 4. 8. a.
7. H. 7. 6. b.
5. H. 7. 15.

Vid. Sect. 748.
4. Co. 80.
Neke's case.
F. N. B. 145.

[r] W. 2. cap. 12.
22. Aff. p. 39.
33. H. 6. 2.
14. H. 7. 2.
40. Aff. 18.
40. E. 3. 42.

[s] Kelway 134.

(1) [See Note 222.]

Sect. 209.

ITEM, si seignior d'un manor voile prescriber, que il ad este custome deins son manor de temps dont memory ne curt, que chescun tenant deins mesme le manor, que maria sa file a ascun home sans licence de le seignior del manor, ferra fine, (1) et ont fait fine al seignior del manor pur le temps esteant, cest prescription est void. Car nul doit faire tiels fines forsque tantselement villeins. Car chescun franke home poit frankement marier sa file, et que pleist a luy et sa file. Et pur ceo que cest prescription est encounter reason, tiel prescription est voyd.

AL S O, if the lord of a manor will prescribe, that there hath beene a custome within his mannour time out of minde of man, that every tenant within the same manor, who marieth his daughter to any man without licence of the lord of the mannour, shall make fine, and have made fine to the lord of the manor for the time being, this prescription is voyd. For none ought to make such fine but onely villeines. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is voyd.

“**Q**UE il ad este custome, &c.”

Here some may object, that such a custome may have a lawfull beginning; for *Littleton* in the beginning of this Chapter, Sect. 174. alloweth, that [a] a freeman may take lands of the lord to be holden of him, that is, to pay a fine for the mariage of his sonne or daughter; and therefore [b] some have thought that such a custome generally within the manor should be good. But the answer is, that though it may be so in a particular case upon such a special reservation of such a fine upon a gift of land, yet to claime such a fine, by a generall custome within the manor, is against the freedome of a freeman, that is not bound thereunto by particular tenure. But a custome may be alledged within a manor, [b] That every tenant (albeit his person be free) that holdeth in bondage or by native tenure, the freehold being in the lord, shall pay to the lord, for the mariage of his daughter, without licence, a fine: and it is called *marcett*, as it were a *chete* or fine for marriage (2). And here *Littleton* saith, that none ought to pay such fines but villeines, (that is) either villeines of blood, or freemen holding in villenage or base tenure. So note a diversity betweene a freeholder and a freeman holding in villenage. Villeines use to pay to their lords in acknowledgement of their bondage for their several heads, and thereupon it is called *chevage*, *chevageium*, of the French word *chiefe*, as it were the service of the head. Of which *Bracton* saith, [c] *chevageium dicitur recognitio in signum subjectionis et domini de capite suo*. And sometimes it is written *chivage*, but more properly *chiefage*. [d] *Chevageium* signifieth also a great misprision for any subject to take summes of money, or other

[a] 10. E. 3. 23.
Roger de Vale's
case. 15. E. 3.
Aid. 33.
[b] 34. H. 6. 15.
a. per Litt.

[b] 43. E. 3. 5.
14. H. 6. 15.

[c] *Bracton*, lib.
1. cap. 10.
Britton, fol. 79.
b.

[d] 27. Ass. 44.

(1) The words *a le volunte le seignior* are added in L. and M.

(2) See further, as to *marcett*, the word

in *Spelm. Gloss.* and the Appendix to *Robinson on Gavelkind*, p. 2.

other gifts yearly in name of *chevage*, because they take upon them to be their chiefe heads or leaders (3).

“*Pur ceo que cest prescription est encounter reason, ceo est voyd.*” This containes one of the maxims of the common law, viz. that all customes and prescriptions that be against reason are voyd.

(2. Ro. Abr. 265.
Ante 113. a.)

Sect. 210.

MES en le county de Kent, ou terres et tenements sont tenus en gavelkind, la, ou, per le custome et use de temps dont memory ne curt, les fits males doivent ovelment enheriter, ceo custome est allowable, pur ceo que il estoit ove ascun reason; pur ceo que chescun fits est auxy graund gentlehome come l'eigne fits est, et per case a plus graunde honor et valour creffera, sil avoit rien per ces ancesters, ou auterment peradventure il ne puissoit tielment creffer, &c.

BUT in the county of Kent, where lands and tenements are holden in gavel-kinde, there, where, by the custome and use out of minde of man, the issues male ought equally to inherite, this custome is allowable, because it standeth with some reason; for every sonne is as great a gentleman as the eldest sonne is, and perchance will grow to greater honour and valour, if he hath any thing by his ancestors, or otherwise peradventure he would not encrease so much, &c.

“**E**N [e] le county de Kent.” For that in no county of England lands [f] at this day be of the nature of gavelkinde of common right, saving in Kent onely. But yet in divers parts of England, within divers mannors and seigniories, the like custom is in force.

[e] Vide l'estatute de Consuetudinibus Kancie, ann. 21. E. 1.
2. E. 3. 12.
3. E. 3. 21. 38.

23. Aff. pl. 12. 8. E. 3. 42. b. (Post. 175 b.) [f] Vide Mirror, cap. 1. sect. 3.

“*En gavelkinde.*” That is, gave all kinde: for this custome giveth to all the sonnes alike (4).

“*Les fits males inheriter.*” And this is the generall custome extending to sonnes. But yet [g] by custome, when one brother dieth without issue, all the other brethren may inherit (1).

[g] 23. Aff. pl. 21.
(1. Ro. Abr. 624.)

40. b.] “*Chescun fitz est auxy grand gentlehome come l'eigne fitz est.*” By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sonnes, every sonne being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet *jure primogenituræ*, the eldest shall beare, as a badge of his birthright, his father's armes without any difference, for that, as *Littleton* saith, *Sectione 5.* he is more worthy of blood; but all the younger brethren shall give several differences, *et additio probat minoritatem*, and [b] *hæreditas inter masculos jure civile est dividenda.*

[b] Fortescue, cap. 40.

“ Ou

(3) [See Note 223.]

[140. b.]

(4) [See Note 224.]

(1) [See Note 225.]

“ *Ou autrement peradventure il ne pouvoit tielment creffer.*” The reason of this is rendered by the poet.

Horace.

*Haud facile emergunt, quorum virtutibus obstat
Res angusta domi.*—————

31. H. 8. ca. 3.
V. 18. H. 6.
cap. 1.
(1. Sid. 136.)

But now by the statute of 31. H. 8. a great part of *Kent* is made descendable to the eldest sonne, according to the course of the common law (2), for that, by the meanes of that custome, divers ancient and great families after a few descents came to very little or nothing.

*In plures quoties rivus deducitur amnis,
Fit minor, ac undâ deficiente, perit.*

Sect. 211.

ITEM, lou per custome appel Burgh English en ascun burgh, le fits puisne inheritera tous les tenements, &c. ceo custome estoit ove ascun certaine reason; pur ceo que le fits puisne (s'il fault pere et mere) pur cause de son juventute, poit le plus meins de tous ses freres luy mesme aider, &c.

ALSO, where by the custome called Burrough English in some burrough, the yongest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the yonger sonne (if he lacke father and mother) because of his yonger age, may least of all his brethren helpe himselfe, &c.

Vide Sect. 165.

[i] 32. E. 3. tit.
Age 81.

[k] Mich. 10.
Ja. Eliot's case
in Brieve de faux
Judgement.

[l] Brit. 187. b.

PER custome apel Burgh English.” Of this custome *Littleton* hath spoken before in the Chapter of Burgage. And in our bookes there is a special kind of Borough English [i]; as it shall descend to the yonger sonne, if he be not of the halfe blood; and if he be, then to the eldest sonne (3).

[k] Within the mannor of *B.* in the county of *Berks*, there is such a custome, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometimes the yongest. And divers other customes there be in like cases. And herewith agreeth *Britton*, who saith, [l] *de terres des anciens demeynes soit use selonque le antient usage del lieu, dount en ascun lieu le tient lieu per usage, que le heritage soit departable entre tous les enfants freres et sores, et en ascun lieu que le eigne avera tout, et en ascun lieu que le puisne frere avera tout.*

“ *Pur cause de son juventute, poit le plus meins de tous ses freres luy mesme aider, &c.*” Here by (&c.) are implied those causes, wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefly and pithily expresth thus:

Horace.

*Imberbis juvenis, tandem custode remoto,
Gaudet equis, canibusque, et aprici gramine campi,*

Cereus

[141.]

(2) [See Note 226.]

(3) [See Note 227.]

*Cereus in vitium flecti, monitoribus asper,
Utilium tardus provisor, prodigus æris,
Sublimis, cupidusque, et amata relinquere pernix.*

And againe, no living creature more infirme than man :

*Nil homine infirmum tellus animalia nutrit
Inter cuncta magis.*——

Homer.

Sect. 212.

ME S si home voile prescriber, que si ascuns avers fueront sur les demesnes de son mannor là damage fea-sants, que le seignior del mannor pur le temps esteant ad use eux de distreyner, et le distresse retainer tanque fine fuit fait a luy pur le damage a la volunt, cest prescription est void ; pur ceo que il est encounter reason, que si tort soit fait a un home, que il de ceo serroit son judge demesne ; car per tiel voy, s'il avoit damages forsque al value d'un mail, il puissoit assesser et aver pur ceo C. lib. que serroit encounter reason. Et issint tiel prescription, ou ascun auter prescription use, si ceo soit encounter reason, ceo ne doit (1) estre allow devant judges ; quia malus usus abolendus est (2).

BUT if a man will prescribe, that if any cattle were upon the demeanes of the mannor there doing damage, that the lord of the mannor for the time being hath used to distreine them, and the distresse to retaine till fine were made to him for the damages at his will, this prescription is voyd ; because it is against reason, that if wrong be done any man, that he thereof should be his own judge ; for by such way, if he had damages but to the value of an halfpeny, he might assesse and have therefore an C. pound, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not bee allowed before judges ; quia malus usus abolendus est.

EST encounter reason, que si tort soit fait a un home, que il de ceo ferra son judge demesne." For it is a maxime in law, aliquis non debet esse iudex in propria causâ. * And therefore a fine levied before the baylifes of Salop was reverfed, because one of the baylifes was partie to the fine, quia non potest esse iudex et pars (3).
10. E. 3. 23.
4. E. 3. 54.
7. E. 3. 24.
38. E. 3. 18.
2. H. 3. 4.
3. H. 4. 8. H. 6. 19. 5. H. 7. 9. b. * Hil. 4. H. 4. coram rege Salop. (2. Ro. Abr. 92, 93. 1. Ro. Abr. 492. 496.)

"Malus usus abolendus est:" and every use is evill, that is (as our author saith) against reason, quia in consuetudinibus non diuturnitas temporis, sed soliditas rationis est consideranda (4). (5. Co. 84.)

And by this rule cited by our author, at the parliament holden at Kilkenny in Ireland, Lionel duke of Clarence being then lieutenant of that realme, the Irish customs called there the Brehon law (for that the

An. 40. E. 3. at Kilkenny.
The Brehon law.

(1) Instead of doit it is voet in L. and M. Roh. and P.

(2) Sect. 174. is placed here in L. and M. as we have formerly noticed. See 117. b. note 2.

(3) See 14. Vin. Abr. 573. 4. Com. Dig. 6.

(4) See Dav. Rep. 32. & 7. Vin. Abr. 180. 185.

the *Irish* call their judges *Brehons*) was wholly abolished, for that (as the parliament sayd) it was no law, but a lewd custome, *et malus usus abolendus est* (5).

Vide Sect. 265.

(Vaugh. 293.)

Rot. Pat.

11. H. 3. 7. Co.

22. b.

Calvin's case.

Rot. Patent.

18. H. 3. M. 17.

N. 21.

But our student must know, that king *John* in the twelfth yeare of his raigh went into *Ireland*, and there, by the advice of grave and learned men in the laws whom he carried with him, by parliament *de communi omnium de Hiberniâ consensu*, ordained and established, that *Ireland* should be governed by the lawes of *England* (1), [141. b. which of many of the *Irishmen*, according to their owne desire, was joyfully accepted and obeyed, and of many the same was soone after absolutely refused, preferring their *Brehon* law before the just and honourable lawes of *England*. *Rex, &c. baronibus, militibus, et omnibus liberè tenentibus salutem. Satis, ut credimus, vestra audit discretio, quòd quando bonæ memoriæ Johannes, quondam rex Angliæ, pater noster, venit in Hyberniam, ipse duxit secum viros discretos et legis peritos, quorum communi consilio, et ad instantiam Hybernensium, statuit et præcepit leges Anglicanas in Hyberniam, ita quòd leges easdem in scripturas redactas reliquit sub sigillo suo ad Scaccarium Dublin.*

Rex comitibus, baronibus, militibus, et liberis hominibus et omnibus aliis de terrâ Hyberniciæ salutem. Quia manifestè esse dignoscitur contra coronam et dignitatem nostram et consuetudines et leges regni nostri Angliæ, quas bonæ memoriæ dominus Johannes rex, pater noster, de communi omnium de Hyberniam consensu, teneri statuit in terrâ illâ, quòd placita teneantur in curiâ Christianitatis de advocacionibus ecclesiarum et capellarum, vel de laico feodo, vel de catallis, quæ non sunt de testamento, vel matrimonio: vobis mandamus, prohibentes quatenus hujusmodi placita in curiâ Christianitatis nullatenus sequi præsumatis in manifestum dignitatis et coronæ nostræ præjudicium, scituri pro certo, quòd si feceritis, dedimus in mandatis justituario nostro Hyberniciæ statuta curiæ nostræ in Angliâ contra transgressionem hujus mandati nostri cum justitiâ procedat, et quòd nostrum est exequatur. In cujus, &c. teste rege apud Winchcomb, 28 die Octobris, anno regni nostri 18. Et mandatum est justituario Hyberniciæ, per literas clausas, quòd prædictas literas patentes publicè legi et teneri faciat.

Rot. Patent.

30. H. 3.

*Rex, &c. pro communi utilitate terræ Hyberniciæ, et pro unitate terrarum, provisum est, quòd omnes leges et consuetudines, quæ in regno Angliæ teneantur, in Hyberniam teneantur, et eadem terra eisdem legibus subiaceat, ac per easdem regatur, sicut Johannes rex, cum illic esset, statuit et firmiter mandavit. Ideo volumus, quòd omnia brevvia de communi jure, quæ currunt in Angliâ, similiter currant in Hyberniam sub novo sigillo regis. In cujus, &c. teste meipso apud Woodstocke. Wherein it is to be observed, that union of lawes is the best meanes for the unity of countries. * Una et eadem lex esse debet tam in regno Angliæ quàm Hyberniciæ. [m] Terra Hyberniciæ inter se habet parliamentum et omnimodas curias prout in Angliâ, et per idem parliamentum facit leges et mutat leges, et illi de eadem terrâ non obligantur per statuta in Angliâ, quia illi non habent milites parliamenti (2).*

* Tit. 13. E. 1.

coram rege in

thesaur. in

longo placito.

[m] 2. R. 3. 12.

in Curia Scacc.

lata. 1. H. 7. 3.

(4. Ind. 350)

By an act of parliament (called *Poyning's law*) holden in *Ireland* in the tenth yeare of *Henry* the seventh, it is enacted, that all statutes made in this realme of *England* before that time, should be of force and be put in use within the realme of *Ireland* (3); which (though it be by way of digression) is not unnecessary for our student to know. But now let us heare our author (4).

(5) [See Note 228.]

(2) [See Note 229 *.]

[141. b.]

(3) Irish Stat. 10. H. 7. c. 22.

(1) [See Note 229.]

(4) [See Note 230.]

CHAP. 12.

Of Rents.

Sect. 213.

TROIS maners de rents y sont, c'estascavoir, rent service, rent charge, et rent secke. Rent service est, lou le tenant tient sa terre de son seignior per fealty et certaine rent, ou per homage fealtie et certain rent, ou per auters services et certaine rent. Et si rent service soit a ascun jour, que doit estre pay, adere, le seignior poit distrainer pur ceo de common droit.

THREE manner of rents there be, that is to say, rent service, rent charge, and rent secke. Rent service is, where the tenant holdeth his land of his lord by fealtie and certaine rent, or by homage fealty and certaine rent, or by other services and certaine rent. And if rent service at any day, that it ought to be payed, be behinde, the lord may distraine for that of common right.

SOME have divided rents into foure kindes, viz. rent service, rent charge, rent distreynable of common right, (whereof somewhat shall be said in this Chapter) and rent secke.

“Rent,” in Latine *redditus*, [a] by some *dicitur à re eundo, quia retroit, et quotannis redit*. * And others say it is derived of *redae. e.*, for that the rent is reserved out of the profits of the land, and is not due till the tenant or lessee take the profits; for *reddendo inde* or *solvendo*, or *reservando inde*, or the like, [b] is as much to say as the tenant or lessee shall pay so much out of the profits of the lands; for *reddere nihil aliud est quàm acceptum aut aliquam partem ejusdem restituere*. Seu *reddere est quasi retro dare*, and hereof cometh *redditus* for a rent.

Here note, for the better understanding of antient records, statutes, charters, &c. *gabel*, or *gavel*, *gablum*, *gabellum*, *gabelletum*, *gabelletum*, and *gavilletum*, doe signifie a rent (1), custome, duty, or service, yeelded or done to the king or any other lord; as, *Wallingford continet 276 bagas, i. e. domus redditentes 9 libras de gablo, i. e. de redditu*: and Oxford, *hæc urbs readebat pro theolonia et gablo regi 20. l. et sextarios mellis*. *Alpharo 10 libras*. And this is the legall signification thereof (2).

“Rent service.” It is called a rent service, because it hath some corporall service incident unto it, which at least is fealty, as here it appeareth.

“Sa terre.” [c] A rent service cannot be reserved out of any inheritance but such as is manurable, whereinto the lord may enter and take a distresse, as in lands and tenements, ~~reversions~~, remainders, and, as some have said, out of the herbage of lands, and regularly not out of any inheritances incorporeall, or that lye in grant.

[d] By act of law one rent or service may issue out of another; as if A. before the statute of *quia emptores terrarum* had given lands to B. to hold to him by fealty and ten shillings rent, and B. had made a feoffment in fee to C. &c. whereby there was a mainity

created; [d] 3. H. 6. 21.

[a] Fleta lib. 3. ca. 14.
Britten ca. 41.
Mirror ca. 2.
feet 16.
Pl. Com. 132. b.
* 10. Co. 127.
Cium's case.
[b] Pl. Com. 138, 139, &c.
in Browning's and Beiting's case. 35 H. 6. 34.
Domesday.
Statutum de gavillett anno 10. E. 2.
(Ante 87. b. Post. 144. 2. Ro. Abr. 446.)

Vide Sect. 218.
(Ante 47. a.)
[c] 44. E. 3. 45.
5. Co. 4. Seignior Mountjoye's case. 9. Aff. 24.
20. Aff. 5.
17. E. 3. 75.
7. Co. 23.
Butt's case.
Pl. Com. 139.
[d] 3. H. 6. 21.

(1) See acc. ante 140. a. note 4.

(2) [See Note 231.]

5. H. 7. 36.
21. H. 7. 39.
1. H. 4. 82.
10. H. 6. 12.
19. E. 3. tit.
Gard. 40.
21. H. 6. 11.

created; in this case *C.* should hold of *B.* either by the same services the law created, or such as he specially reserved, and *B.* did by operation of law hold those services of *A.* by fealty and ten shillings rent, that is to say, by rent and service out of rent and service: and if the rent be behinde, the lord paramount may distraine upon the land for his rent, for both mesnalty and feigniory doe issue out of the land, the mesnalty immediately, and the feigniory mediately, which is worthy of due consideration and observation.

[e] Britton fol.
100. a.
(Ante 96. a.)
[f] Fleta lib.
3. ca. 14.
(Ante 91. b.)

“*Certaine rent.*” [e] For the rent must be certaine, or which may bee reduced to a certainty; for *id certum est, quod certum reddi potest*. [f] *Continetur charta reddendo inde annuatim ad tales terminos, vel faciendo inde talia servitia, vel tales consuetudines, quæ omnia debent esse certa et in chartâ expressa, &c.* But of this I have spoken Sect. 136. And the rent may as well be in delivery of hens, capons, roses, spurres, bowes, shafts, horses, hawkes, pepper, comine, wheat, or other profit that lyeth in render, office, attendance, and such like, as in payment of money. [g] But a man upon his feoffment or conveyance cannot reserve to him parcell of the annuall profits themselves, as to reserve the vesture or herbage of the land or the like (3), for that should be repugnant to the grant: *non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua.*

[g] 38. H. 6. 38.
2.
(Ante 47. a. 4. b.)

“*Poet distreiner pur ceo.*” For where there is a fealty, &c. incident to the rent, there is a distresse incident also thereunto. [b] But it is to be understood, that for a rent or service, the lord cannot distreine in the night, but in the day time: and so it is of a rent charge. But for dammage feasaunt one may distreine in the night, otherwise it may bee the beasts will be gone before he can take them.

[b] Mirror ca.
2. sect. 16.
10. E. 3.
Avovery 137.
11. H. 7. 5.

[i] W. 1. ca. 1.
2. H. 4. ca. 1.
7. H. 4. ca. 1.
4. H. 8. ca. 8.

“*De common droit.*” Of common right, [i] that is, by the common law, so called, because the common law is the best and most common birth-right that the subject hath for the safeguard and defence, not onely of his goods, lands and revenues, but of his wife and children, his body, fame, and life also. So as the meaning of *Littleton* in this particular case is, that the lord may distreine for his rent of common right, that is, by the common law, without any particular reservation or provision of the party. And it is to be observed, that the common law of *England* sometimes is called right, sometimes common right, and sometimes *communis justitia*. In the grand charter the common law is called right. *Rectum nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum.* In the statute of *W. 1. c. 1.* it is called *common droit*. *En primes voet le roy, et commande, que le peace de s. eglise et de la terre soit bien garde et maintaine en tous points, et que common droit soit fait a tous, auxibien aux peers come aux riches, sauns regard de nulluy;* which agreeth with the ancient law in the time of king *Edgar*. *Porro autem has populo quas servet proponimus leges. Primum publici juris beneficio quisquam fruitur, idque ex æquo et bono, sive is dives sive inops fuerit, jus reddit.* And *Fleta* saith, *Item quod pax ecclesiæ et terræ inviolabiliter observetur, et quod communis justitia singulis pueriter*

Lamb fo. 72.
inter Leges Regis
Edgari. Fleta,
lib. 1. c. 29.

riter exhibeatur. And all the commissions and charters for execution of justice are, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ.* So as in truth justice is the daughter of the law, for the law bringeth her forth. And in this sense being largely taken, as well the statutes and customes of the realme, as that which is properly the common law, is included within *common droit.* Littleton in this his treatise nameth *common droit* fixe times.

Vide Sect. 214.
216. 226. 252.
331.

142. b.]

Sect. 214.

ET si home voyloit doner terres ou tenements a un auter en taile, rendant a luy certain rent per an (1), il de common droit poit distreiner pur le rent aderere, coment que tiel done fuit fait sans fait, pur ceo que tiel rent est rent service. En mesme le maner est, si leas soit fait a un home pur terme de vie, ou d'auter vie (2), rendant al lessor certaine rent, ou pur terme de ans rendant certaine rent.

AND if a man will give lands or tenements to another in the taile, yeelding to him certaine rent by the yeare, hee of common right may distraine for the rent behind, though that such gift was made without deed, because that such rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendring to the lessor certaine rent, or for tearme of yeares rendring rent.

“**S**AUNS fait.” For it is a rule in law, that a rent service may be reserved without deed.

35. H. 6. 34.
(Cro. Eliz. 33.
Post. 225. b.)

“**E**n mesme le maner, si lease soit fait, &c.” For these be rents services, because fealty is incident to these rents; for (as it hath bin said before) a lessee for life or years shall doe fealty. And if a man make a lease at will, reserving a rent, the lessee shall not doe fealty, and yet the lessor shall distreine for the rent of common right.

Vide Sect. 131,
132.

“**R**endant” commeth of the word *reddo*, i. e. *rem pro re dare*, and signifieth yeelding or repaying: but of this I have spoken before in this Chapter, Sect. 213.

Sect. 215.

ME S en tiel cas, ou home sur tiel done ou lease veile reserver a luy rent service, il covient, que le reversion de les terres et tenements soit en le donor ou lessor. Car si home veile faire feoffment en fee, ou veile doner terres en taile, le remainder oustre en fee simple, sans

BUT in such case, where a man upon such a gift or lease will reserve to him a rent service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in fee, or will give lands in taile, the remainder

(1) *Per an* not in L. and M. nor Roh. but in P. and Red.

(2) *Ou d'auter vie* not in L. and M. nor Roh. but in P. and Red.

sans fait, reservant a luy certaine rent, tiel reservation est void, pur ceo que nul reversion remaine en le donor, et tiel tenant tient la terre immediatment de la seignior, de que son donor tencit, &c.

remainder over in fee simple, without deed, reserving to him a certaine rent, this reservation is void, for that no reversion remaines in the donor, and such tenant holds his land immediately of the lord, of whom his donor held, &c.

(Ante 22. b.
Plowd. 151. a.
162. a. Cro.
Cha. 400. 548.
2. Ro. Abr. 60.)

“**REVERSION,**” *Reverso*, commeth of the *Latine* word *re-vertor*, and signifieth a returning againe; and therefore *reverso terre est tanquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum, &c.* as in the cases that *Littleton* here hath put.

(Ante 47. a.)

“*Il covient, que le reversion, &c. soit en le donor. ou lessor, &c.*” This is not to be understood only of a reversion immediately expectant upon the gift or lease. For if a man maketh a gift in taylor, the remainder in taylor, reserving a rent, and keepe the reversion in himselfe, this is a rent service.

[k] 8. E. 4. 48.
26. Aff. pl. 66.
(Ant. 47. a.)
[l] 35. H. 6. 34.
(Post. 317. a.)

“*Reservant.*” *Reserver* commeth of the *Latine* word *reservo*, [143. a.] that is, to provide for store; as when a man departeth with his land, he reserveth or provideth for himselfe a rent for his owne livelihood. And sometime it hath the force of *saving* or *excepting*. So as [k] sometime it serveth to reserve a new thing, viz. a rent, and [l] sometime to except part of the thing in *esse* that is granted (1).

(Ant. 23. a.)

[m] Litt. fo. 4.
Old Tenures 5.
38. E. 3. 7.
33. H. 6. 7.

And it is to be understood, that in the case of the gift in taylor, lease for life or years, the fealty is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himselfe the fealty, or such like service. But the rent he may except; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in taylor without any reservation, the donee shall hold of the donor by the same services that he held over. [m] But otherwise it is of an estate for life or years; for there if he reserveth nothing, he shall have fealty onely, which is an incident inseparable to the reversion, as hath been said.

[n] 40. E. 3. 10.
10. E. 4. 1.
12. E. 4. 16.
15. E. 4. 18.
18. E. 4. 12.
18. H. 8. 4.
3. H. 7. 13.
F. N. B. 219.
11. H. 4. 39.
38. E. 3. 36.
44. E. 3. 8.
(Ant. 49. b.)
[o] 2. Co. 51.
Cholmely's case.

“*Le remainder oustre en fee simple sans fait.*” Here it appeareth, that if a man maketh a gift in taylor, the remainder in fee, without deed [n], the remainder is good, and passeth out of the donor by the livery of seisin: and so it is of a lease for life or yeares, the remainder over in fee; for the particular estate and the remainder, to many intents and purposes, make but one estate in judgement of law. *Vide* Sect. 60.

“*Remainder,*” in legall *Latine*, is *remanere*, coming of the *Latine* worde *remaneo*; for that [o] it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time, as in the cases here of *Littleton* appeareth (2).

(Ant. 49. a. Plowd. 25. a. 35. a.)

(1) [See Note 232.]

(2) See *Fearn's* *Ess. on Conting. Rem.* 3d ed. p. 5. to 11.

Sect. 216.

ET ceo est per force de le statute de quia emptores terrarum. Car devaunt le dit estatute, si home fesoit un feoffement en fee simple, per fait ou sans fait, rendant a luy et a ses heires certaine rent, ceo fuit rent service, et pur ceo il pouvoit distreiner de common droit; et s'il fuit nul reservation d'ascun rent, ne d'ascun service, uncore le feoffee tenuit del feoffor per autiel service, que le feoffor tenuit oustre de son seignior procheine paramont.

AND this is by force of the statute of *quia emptores terrarum*. For before that statute, if a man had made a feoffment in fee simple, by deed or without deed, yeelding to him and to his heires a certaine rent, this was a rent service, and for this hee might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramont.

“**Q**UIA emptores terrarum.”

Hereof is spoken before in the Chapter of *Frankalmoigne*, Sectione 140.

(2. Inst. 500.
Ant. 98. b.)

“*Per fait ou sans fait, &c.*” For all rent services may be reserved without deed (as hath been said), and as it appeareth here. (Ant. 142. b.)

And at the common law if a man had made a feoffment in fee by parol, he might upon that feoffment have reserved a rent to him and his heires; because it was a rent-service, and a tenure thereby created.

“*Et s'il fuit nul reservation, &c. le feoffee tenuit del feoffor per autiels services, &c.*” This is evident, and agreeth with our bookes [*], that in this case the law created the tenure; wherein it is to be observed, how the law regardeth equitie and equalitie, without any provision or reservation of the party.

(Dy. 145. b.
Ant. 23. a.)

[*] Britton
fol. 100.

2. E. 3. 33.

25 E. 3. gard. 21.

49. E. 3. 10.

22. Aff. pl. 53.

Ipsæ etenim leges cupiunt, ut jure regantur.

7. H. 4. 14. 23. E. 3. avowrie 235. 4. H. 6. Littl. cap. Taille, Sect.

143. b.]

Sect. 217.

MES si home, per fait endent, a cel jour fait tiel done en fee taile (1), le remainder ouster en fee; ou lease a terme de vie, le remainder ouster en fee; ou un feoffment en fee; et per meme l'indenture il reserve a luy et a ses heires l'une certaine rent, et que si le rent soit aderere, que bien lirroie a luy

BUT if a man, by deed indented, at this day maketh such a gift in fee taile, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heires a certaine rent, and that if the rent be behind, it shall be

(1) Fee not in L. and M. Roh. and Redm.

luy et a ses heires a distreiner, &c. tiel rent est rent charge; pur ceo que tielx terres ou tenements sont charges ove tiel distresse per force de le scripture tantollement, et nemy de common droit. Et si tiel home, sur fait endent, reserva a luy et a ses heires certain rent, sans aucun tiel clause mise en le fait, que il poit distreiner, donque tiel rent est rent secke; pur ceo que il ne poit venir de aver le rent, si ceo soit deny, per meane de distresse; et s'il ne fuit unques en cest cas seisie de le rent, il est sans remedie, come serra dit apres.

be lawfull for him and his heires to distreine, &c. such a rent is a rent charge; because such lands or tenements are charged with such distresse by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heires a certaine rent, without any such clause put in the deed, that he may distreine, then such rent is rent secke; for that hee cannot come to have the rent, if it be denied, by way of distres; and if in this case hee were never seised of the rent, he is without remedie, as shall be said hereafter (2).

Britton fol. 100.
Fleta lib. 3.
ca. 14. Vide
Sect. 370.
Post. 229. a.
(5. Co. 20. b.
2. Ro. Abr. 22.
3. Leon. 16.
2. Inst. 672.)
[p] 8. E. 4. 8.
11. H. 7. 22.
35. H. 6. 34.
20. E. 4. 13.
17. E. 3.
12. H. 4. 17.
(2. Ro. Abr.
449.)
[q] Fleta lib. 3.
ca. 14. Britton
fol. 100.

“**PER** fait endent.” It cannot be a deed indented unlesse it be actually indented; for albeit the words of the deed be *hæc indentura*, &c. yet if it be not indented indeed, it is no indenture. But if the deed be indented, albeit the words of the deed be not *hæc indentura*, yet it is an indenture (3).

And it is holden that [p] if a feoffment in fee be made by deed poll reserving a rent, this reservation is good; for when the feoffee accepts the deed and livery of the land, he agreeth to the rent, and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee. But of this more hereafter. In the mean time it is to be noted, that of ancient time a deed indented was called *charta cyrogrophata*; (4) or *charta communis*, because each party had a part. And a deed poll was called *charta de unâ parte*. [q] *Chartæ autem de purâ donacione et simplici penès donatorium et ejus hæredes debent remanere. Communes verò duplicari debent, ita quòd quilibet habeat partem suam; vel si una sit tantum, tunc in equâ manu communis amici utriusque ponatur, salvo custodienda, dum cuilibet partium necesse fuerit exhibendum.*

[r] 12. E. 2.
feoffments 8.
18. E. 2. Aff. 381.
(Ant. 47. a.
2. Ro. Abr. 447.
Cro. Cha. 289.)

“*Reservant a luy.*” [r] Note, it is a maxime in law, that the rent must be reserved to him from whom the state of the land moveth, and not to a stranger. [s] But some doe hold, that otherwise it is in the case of the king.

[s] 35. H. 6. 36. (2. Ro. Abr. 447. 425. Mo. 93. 168.)

Old Tenures.
Britton cap.
66. 164.
F. N. B. 210.
Braft. 86.
[t] 7. Co. 28. b.
Maund's case.
H. 43. El. in.
Com. Banco.
Rot. 1 o8. inter
Maund & Gre-
gory.

“*Et tiel rent est rent charge.*” It is called a rent charge because the land for payment thereof is charged with a distresse. If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee farme. (5) Here Littleton putteth his case, and so did he in the next Section before, of a clause of distresse generally granted. [t] A man granted a rent out of certaine land, *pro consilio impenso et impedendo*, to have and to hold to him and to his assignees for terme of his life, payable at four feasts in the yeare, and for default of payment upon demand it

(2) See post. Sect. 341.

(3) [See Note 233.]

(4) [See Note 234.]

(5) [See Note 235.]

it should be lawfull for him to distrayne; the grantee granted the rent over; the assignee after one of the dayes demanded the rent, and distreyned, and the distresse adjudged lawfull; for he needs not make a demand at any of the dayes, as in the case of re-entry, but he may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

“*Distreyner, &c.*” Here by (&c.) is implied what things are distreynable, which elsewhere is expressed at large. Also where the distresse is to be taken in the same land, and in some other, which with many differences is set downe in his proper place.

“*Il serra sans remedie.*” Note, that upon a reservation of a rent upon a feoffment in fee by deed indented, [w] the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faciendo, tenendo, reservando, &c.* are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the estate is bound thereby.

And where *Littleton* putteth his case, when a reservation is made upon an estate that passeth by livery, the same law it is, if a man at this day doe bargain and sell his land by deed indented and inrolled according to the statute, a rent may be reserved thereupon; for albeit an use had onely passed by the common law, yet now by the statute of 27. H. 8. cap. 10. the use and possession passe together, and so it was adjudged. * And so it is of a grant of a reversion or remainder, and any other conveyance of lands or tenements, whereby any estate doth passe.

M. 40. & 41.
El. in Com.
Banco inter
Stanly & Read.
18. El. Dyer 348.
(Hut. 23. 42.
Post. 153. b.
2. Ro. Abr. 426.
Dy. 2. Post. 202.
a. 204. a. Dy. 51.
Plowd. 7. Perk.
f. 101. Mo. 5.
March 149.)
(Vide Sect. 221.
Ant. 47. a.)

[w] 33. E. 3.
Annuity 52.
1. H. 4. 5.
26. Aff. pl. 66.
21. E. 4.
(1. Ro. Abr.
226.)

* Mich. 39. &
40. El. in Com.
Banco inter
Wicks & Tillard.

Sect. 218.

AUXY, si home seisie de certain terre graunt, per un fait polle, ou per indenture, un annual rent issuant hors de mesme la terre, a un auter en fee, ou en fee taile, ou pur terme de vie, &c. ovesque clause de distresse, &c. donques ceo est rent charge; et si le grant soit sans clause de distresse, donques il est rent secke. Et nota, que rent secke idem est quod redditus ficcus; pur ceo que nul distresse est incident a ceo.

ALSO, if a man seised of certain land grant, by a deed poll, or by indenture, a yearly rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, &c. with a clause of distresse, &c. then this is a rent charge; and if the grant be without clause of distress, then it is a rent secke. And note, that rent secke idem est quod redditus ficcus; for that no distresse is incident unto it.

“*SEISIE de terre.*” [x] Note, that a rent cannot be granted out of a piscary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyne, or which may be put in view to the recognitors of an assise, as hath beene said before in this

[x] 32. E. 3. tit.
scir. fac. 100.
40. E. 3.
Pl. Com. 139.
(Ant. 47. a.
142. a. Vaugh.
202. 204.)

chapter.

(1) See further as to this difference between a re-entry to avoid an estate and an

entry to distrain, the second point in Maund's case above cited, and Gilb. on rents 73.

Vide Sect. 213.
 [z] 10. E. 4. 3. b.
 33. H. 6. 5.
 50. E. 3. 9.
 3. E. 4. 8.
 5. E. 3. Fines 1.
 9. E. 3. 7.
 46. E. 3. 27.
 21. H. 6. 8.
 temp. E. 1.
 Aff. 42.
 * 19. E. 3. Title
 34.
 (Ant. 114. a.
 6. Co. 58.)

chapter. And though it be out of lands or tenements, [z] yet it must be out of an estate that passeth by the conveyance (as by all *Littleton's* examples appeareth), and not out of a right: as if the disseisee release to the disseisor of land, reserving a rent, the reservation is void, *et sic de similibus*.

“Grant per fait.” * Also a man may have a rent by prescription.

“Rent secke *idem est quod redditus ficcus*.” This needs no explanation, for *Littleton* expounds it himselfe.

Sect. 219.

[144. b.]

ITEM, si home granta per son fait un rent charge a un autre, et le rent est arriere, le grantee poet eslier, s'il voet suer un brieve de annuitie de ceo envers le grantor, ou distreyner pur le rent arriere, et le distresse retainer tanque il soit de ceo pay. Mes il ne poet faire, ne aver, ambideux ensemble, &c. Car s'il recover per brieve d'annuity, donques la terre est discharge de le distresse, &c. Et s'il ne fust brieve de annuitie, mes distreine pur les arrerages, et le tenant fust son replegiare, et donques le grantee avowa le prisel de le distresse en le terre en court de record, donques est la terre charge, et la person del grantor discharge d'action d'annuity.

AL S O, if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuse, whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behinde, and the distresse detain until he be payd. But he cannot doe, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distreine for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distresse in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.

(7. Co. 24. 1. Ro. Abr. 227.) “**R**ENT charge.” Here it appeareth by *Littleton*, that this *primâ facie* is a rent charge, whereof in this chapter shall be spoken more at large. And so it is of a rent secke.

“Home grant.” Put case, that *A.* be seised of lands in fee, and he and *B.* grant a rent charge to one in fee, this *primâ facie* is the grant of *A.* and the confirmation of *B.* but yet the grantee may have a writ of annuity against both. [a] Two men grant an annuity of twenty pounds *per annum* to another, although the persons be severall, yet he shall have but one annuity. But if the grant be, *obligamus nos, et utrumque nostrum*, the grantee may have a writ of annuity against either of them; but he shall have but one satisfaction.

“Brieve de annuitie” is a writ for the recovery of an annuity. [b] An annuity is a yearly payment of a certaine summe of mo-

[a] 16. E. 2. tit. Annuity 47. Vide Sect. 314.
 (5. Co. 86. 1. Ro. Abr. 895. Hob. 59. Plowd. 439.)
 [b] Doct. & S. ud. ca. 3.
 17. E. 4. Dyer 344. b. 45. E. 3. Executor 72. (Finch's Law 301. F. N. B. 152. a.)

ney granted to another in fee for life or yeares, charging the person of the grantor onely. [c] But not only the grantee, but his heire and his and their grantee. (1) also shall have a writ of annuity. [d] But if a rent charge be granted to a man and his heires, he shall not have a writ of annuity against the heire of the grantor, albeit he hath assents, unless the grant be for him and his heires (2.)

[c] 3. E. 6. Dyer 65. And Sergeante Bendloes reporteth, that so was the opinion of the Court.

[d] 2 H. 4. 13. 1. Ro. Abr. 226.)

Dyer 17. Eliz. 344. b. (10. Co. 128. Hob. 58. Plowd. 457. a. 1. Ro. Abr. 226.)

"*Poet essier.*" The grantee hath election to bring a writ of annuity, and charging the person onely to make it personall; or to distraine upon the land, and to make it reall.

But if a man grant a rent charge to a man and his heires, and dieth, and his wife bring a writ of dower against the heire, the heire in barre of her dower claimes the same to be an annuity and no rent charge; yet the wife shall recover her dower; for he cannot determine his election by claime, but by suing of a writ of annuity (as *Littleton* saith), neither can the heir have after the endowment an annuity for the two parts; for that should not be according to the deed of grant, for either the whole must be a rent charge, or the whole an annuity. But *Littleton* is to be understood with some limitation: [e] for of a rent granted for owelty of partition, a writ of annuity doth not lie, because it is of the nature of the land descended. Also of such a rent as may be granted without a deed a writ of annuitie doth not lie, though it be granted by deed.

(1. Co. 36. and Mo. 83.)

[e] 29. Aff. p. 23.

[f] And here it is to be noted, that there is no election given of two severall things, as if the grant were of an annuitie or a robe yearly, &c. for there the grantor hath election at the day to deliver which he would. But here are two remedies given for one yearly summe, and consequently the grantee shall at any time have election to take which of the remedies hee will; for in all cases where severall remedies be given, the party to whom the law giveth the remedies, it giveth him withall election to take which of the remedies he will.

[f] Sir Rowland Heyward's case, 2. Co. 36. 28. E. 3. 98. 41. E. 3. 10. a. 2. H. 4. 12. 6. H. 4. 10. 36. H. 6. 10. 9. E. 4. 46. 21. E. 4. 55. b. 1. E. 5. 1. F. N. B. 121.

"*Mais il ne poet faire ou aver ambideux ensemble.*" For then he should recover one thing twice, which should be a double charge to the grantor.

(Plowd. 439. Post. 310. b. 1. Ro. Abr. 446, 447. 725. Hob. 58.) 2. Co. 36, 37. in Sir Rowland Heyward's case.

Note, as to elections, these diversities following: (1)

First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heires or executors.

Secondly, when one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the partie, his heires or executors, may make election when they will.

Thirdly,

[145. a.]

(1) [See Note 236.]

(2) [See Note 237.]

(1) Lord Coke extracts the six following rules concerning election *verbatim* from his own Reports. See 2. Co. 36. b.

Thirdly, when election is given to severall persons, there the first election made by any of the persons shall stand.

Fourthly, in case an election be given of two severall things, alwaies he, which is the first agent, and which ought to doe the first act, shall have the election. As if a man granteth a rent of twentie shillings or a robe to one and to his heires, the grantor shall have the election; for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, rendring a rent or a robe, the lessee shall have the election *causâ quâ supra*. And with this agree the bookes in the * margent. [g] But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple to be taken in his wood of D. there the grantee shall have election; for he ought to doe the first act, *scil.* to fell and take the same.

Fifthly, when the thing granted is of things annuall, and are to have continuance, there the election remaineth to the grantor, (in case where the law giveth to him election) as well after the day, as before. Otherwise it is when the things are to be performed *unicâ vice*. And therefore if I grant to another for life an annuitie or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he bring his writ of annuitie for the one onely, and recover, this judgement shall determine his election for ever; for he shall never have a writ of annuitie afterwards, but a *scire facias* upon the said judgement. Which reason, *Fitzherbert*, in his *Natura Brevium*, (2) not observing, held an opinion to the contrarie. But if I contract with you to pay unto you twentie shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one or for the other.

Sixtly, the feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee. (3)

“ *S’il recover en brieve de annuitie, donques est la terre discharge de distresse.*” Here is to be observed, that this determination of the election of the grantee must be by action or suit in court of record; [b] for albeit the grantee distreine for the rent, yet hee may bring a writ of annuitie and discharge the land. And *Littleton* putteth his case here surely upon a recoverie in a writ of annuitie. [i] But if the grantee doth bring a writ of annuitie, and at the returne thereof appeare and count, this is a determination of his election in a court of record, albeit he never proceedeth any further. [k] As if a wife be endowed *ex assensu patris*, and the husband dieth, the wife hath election either to have her dower at the common law or *ex assensu patris* (4); if she bring a writ of dower at the common law, and count, albeit she recover not, yet shall she never after claime her dower *ex assensu patris*.

So

(2) See F. N. B. 152. G.

(4) See acc. before Sect. 41.

(3) [See Note 238.]

(1. Ro. Abr. 725.
Ant. 46. b.
Plowd. 6. post.
146. a. Hob. 174.)
* 9. E. 4. 36. b.
13. E. 4. 4. b.
L. 5. E. 4. 6. b.
11. E. 3. annu.
27. 11. Aff. p. 8.
29. Aff. 55.
3. E. 3. tit.
Aff. 175.
43. E. 3. tit.
Barre 194.
(5. Co. 25. 41.)
[g] 2. H. 7. 23. a.

(Ant. 90. b.
6. Co. 45.)

9. E. 4. 36.
13. E. 4. 4. and
the other above-
said bookes.
(Plowd. 6.
1. Ro. Abr. 726.)

[b] 17. El. Dyer
344. b.

[i] F. N. B.
152. a.
5. H. 7. 33. b.

[k] 12. E. 2.
Dower 158.

[7] So if the grantee bring an assise for the rent, and make his plaint, he shall never after bring a writ of annuitie. But the purchasing of a writ of annuitie, and entrie of it in court of record, or of an assise, is no determination of the election; because an estranger may purchase a writ in the name of the grantee, and enter it of record: but if the grantee appeare thereunto, &c. then this doth amount to a determination of his election, as hath been said. [1] 10. E. 4. 17.

[145. b.] “*Son replegiare.*” Littleton spake immediately before of *un briefe d’annuity*, but here he saith *son replegiare*; because goods may be replevied two manner of wayes, viz. by writ, and that is by the common law, or by the pleint, and that is by the statutes for the more speedy having againe of the cattell and goods. A *replegiare* lyeth, as Littleton here teacheth us, where goods are distreined and impounded, the owner of the goods may have a writ *de replegiari facias*; whereby the sherife is commanded, taking sureties in that behalfe, to redeliver the goods distreined to the owner, or upon complaint made to the sherife he ought to make a replevy in the [county]. *Replegiare* is compounded of *re* and *plegiare*, as much as to say, as to redeliver upon pledges or sureties; and in the statute of *Marlebridge*, *deliberare* is used for *replegiare*. [m] And the sherife ought to take two kinde of pledges, one by the common law, and they be *plegii de prosequendo*, and another by the statute, viz. *plegii de retorno habendo*. Vide Sect. 58. what things may lawfully be distreyned, whereupon a *replegiare* may be sued. The formes of the writ you shall reade in the Register and F. N. B.*

[n] It is a generall rule, that the plaintife must have the property of the goods in him at the time of the taking. [o] But yet if the goods of a villeine be distrayned, the lord of the villeine shall have a replevy; because the bringing of the replevy amounts to a clayme in law, and vests the property in the plaintife. But in that case if the goods of the villeine be taken by a trespassse, the lord shall have no replevy; because the villeine had but a right.

[p] But there be two kinde of properties; a generall propertie, which every absolute owner hath; and a speciall propertie, as goods pledged or taken to manure his lands, or the like; and of both these a *replegiare* doth lye.

And albeit it be provided by the statute of *Marlebridge*, [cap. 21.] *quod vicecomes post querimoniam inde sibi factam ea, sine impedimento vel contradictione ejus qui dicta averia ceperit, deliberare possit, &c.*

[q] yet where the defendant claimes property, the sherife cannot proceed; for it is a rule in law, that property ought to be tryed by writ. And therefore in that case where the tryall is by pleint, the plaintife may have a writ *de proprietate probanda* directed to the sherife to trie the propertie; and if thereupon it be found for the plaintife, then the sherife to make deliverance (for so be the words of the writ); and if for the defendant, he can no further proceed. But that is but an enquest of office; and therefore if thereby it bee found against the plaintife, yet he may have a writ of replevy to the sherife; and if he returne the claime of propertie, &c. yet shall it proceed in the court of common pleas where the propertie shall be put in issue and finally tried. And the sherife may take a pleint upon the said act out of the county, and make replevyn presently; for it should be inconvenient for the owner to forbear his cattell till the county day.

(2. Inst. 139.)
Glanvill. lib. 12.
ca. 12.
Marlbr. ca. 21.
W. 1. ca. 16, 17.
W. 2. ca. 39.
Fleta lib. 2. ca. 40.
Marlbr. ca. 21.
(Doctr. Plac. 314.)
21. H. 6. Returne de Vic. 17.
(Post. 161. 2.)
[m] W. 2. ca. 2.
Fleta lib. 4.
ca. 5. 4. H. 6. 15.
* Registr. F. N. B. 68.
[n] 3. E. 3. 74.
6. H. 4. 2. & 39.
9. H. 6. 39.
20. H. 6. 19.
[o] 33. E. 3. Replev. 43.
42. E. 3. 18.
9. H. 6. 25.
F. N. B. 69. F. 6. H. 7. 9.
19. E. 3. Repl. 32.
[p] 42. E. 3. 18.
11. H. 4. 17. 23.
47. E. 3. 12.
48. E. 3. 20.
7. H. 4. 17.
(2. Ro. Abr. 430. Plowd. 524.)
Marlbr. ca. 21.
[q] 30. E. 3. 22.
31. E. 3. Replev. 35. & 4.
7. H. 4. 26. 28.
31. H. 6. Prop. Prob. 5.
1. E. 4. 9.
21. E. 4. 64.
2. Eliz. Dyer 173.
21. E. 4. 66.
(2. Ro. Abr. 431.)

[r] 5. E. 3. 38.
11. H. 4. 4.
17. E. 2. Propr.
Prob. 6.

[r] It is to be noted, that a man cannot claime propertie by his bailife or servant; and the reason is, for that if the clayme fall out to be false he shall be fined for his contempt, which the lord cannot be unlesse he maketh clayme himselfe; for *nemo punitur pro alieno delicto* (1).

34. H. 6. 47.

In a speciall case a man may have a replevyn of goods not distreyned. As if the mesne put in his cattell in lieu of the cattell of the tenant paravaile, that he is bound to acquite, he shall have a replevyn of those cattell that never were distreyned.

31. E. 3. Gage
deliver. 5.

(Post. 282. b.
Doct. & Stud.
129. b.)

If a man by his deed grant a rent with clause of distresse, and grant further, that hee shall keep the goods distreyned against gages and pledges, untill the rent be payd, yet shall the sherife replevy the goods distreyned; for it is against the nature of such a distresse to be irreplevisable, and by such an [invention] the currant of replevyns should be overthrowen to the hindrance of the common wealth; and therefore it was disallowed by the whole court, and awarded that the defendant should gage deliverance, or else goe to prison. And *Bracton* is of the same opinion; for he saith, *Eodem modo de viâ obstructâ, per breve quoddam iusticiet propter communem utilitatem, ne transeuntes ire diu impediuntur, quia hoc esset commune damnum; et in hoc viccomes et iusticiarii faciant sicut super detentionem averiorum contra vadium plegii, propter communem utilitatem, ne animalia diu inclusa pereant*; which in mine opinion is an excellent point of learning.

Bracton lib. 4.
fo. 233. a. & b.

28. E. 3. 92.
3. H. 4. 12.
34. H. 6. 37.
2. E. 4. 23.
(5. Co. 19. a.)

If the beasts of divers severall men be taken, they cannot joyne in a *repleg.* but every one must have a severall replevyn (2). And so in a replevyn it is a good plea to say, that the property is to the plaintife and to a stranger; and where there be two plaintifes, that the property is to one of them.

Regist. fol. 133.
Bract. fo. 121.
& 154. W. 1.
ca. 11. Fleta lib.
2. ca. 2.
F. N. B. 66. b.

There is also a writ *de homine replegiando*. But *Littleton* is ready to give you further instruction: therefore heare him.

“*Et avowea le prise, &c. en court de record.*” Here it appeareth, that an avowry in a court of record, which is in nature of an action, is a determination of his election before any judgement given (3). And this is a good prooffe of that, which hath beene formerly said of the writs of annuity and assise (4).

21. H. 6. 24.
per Newton.
27. H. 6. 4.

*Electio semel facta et placitum testatum non patitur regressum.
Quod semel placuit in electionibus amplius displicere non potest.*

[146. a.]

If a rent charge be granted to *A.* and *B.* and their heires; *A.* distreyneth the beasts of the grantor, and he sueth a replevin; *A.* avoweth for himselfe, and maketh consufance for *B.*; *A.* dyeth and *B.* surviveth: *B.* shall not have a writ of annuity; for in that case, the election and avowry for the rent of *A.* barreth *B.* of any election to make it an annuity, albeit he assented not to the avowry.

(2. Co. 36. b.)

But here is another diversity to be observed betweene the case aforesaid of the grant of the rent where he (as hath beene said) may make it either reall or personall, and when a man may have election to have severall remedies for a thing that is meerly personall or meerly

(1) [See Note 239.]
(2) [See Note 240.]

(3) Acc. post. 268. a. F. N. B. 152. A.
(4) See ante 145. a.

meerly reall from the beginning. As if a man may have an action of account or an action of debt at his pleasure, and he bringeth an action of account and appeare to it, and after is nonsuite, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assise, and of a writ of entry in the nature of an assise, and the like.

28. E. 3. 98. b.
27. E. 3. 89. b.
(6. Co. 7. a.)
Ant. 139. a.)

Sect. 220.

ITEM, si home voile qu'un auter averoit un rent charge issuant hors de sa terre, mes il ne voile que sa person soit charge en ascun maner per brieve d'annuitie, donques il poit aver tiel clause en la fine de son fait: Proviso semper, quod præsens scriptum, nec aliquid in eo specificatum, non aliquid se extendat ad onerandum personam meam per breve vel actionem de annuitate, sed tantummodo ad onerandum terras et tenementa mea de annuali redditu prædict', &c. (1) Donques la terre est charge, et le person del grantor discharge.

ALSO, if a man would that another should have a rent charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then hee may have such a clause in the end of his deed: *Provided alwaies, that this present writing, nor any thing therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearely rent aforesaid, &c.* Then the land is charged, and the person of the grantor discharged.

BY this Section it appeareth, that when in a generall grant the law doth give two remedies, that the grantor may provide that the grantee shall not use one of them and leave the party to the other (2). But where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant.

28. H. 8. Dier.
9. b.
(Hob. 72.)

“*De annuali redditu, &c.*” Here by (&c.) and the consequent of this Section bee implied divers excellent points of learning, viz. If a man by his deede granteth a rent charge out of the mannour of Dale (wherein the grantor hath nothing) with such a proviso that it shall not charge his person; albeit the repugnancie doth not appeare in the deed, yet the proviso taketh away the whole effect of the grant, and therefore is in judgement of law repugnant; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person (3). For which cause our author putteth his case of a rent charge issuing truly out of land. But if a man by his deed grant a rent charge out of land, provided that it shall not charge the land, albeit the grantee hath a double remedy, as hath beene said, yet the proviso is repugnant; because the land is expressly charged with the rent, but the writ of annuity is but implied in the grant, and therefore that may bee restrained without any repugnancie, and sufficient remedy left for the grantee; for which cause our author putteth his case of the restraint of bringing a writ of annuity. And yet in

(1. Ro. Abr. 227.
Hutt. 33.)

So it was resolved by the justices in 11. H. 8. as justice Spilman reporteth.
9. H. 6. 53.

(1) For the operation of this sort of proviso, see Dy. 222. a. and 2. Co. 72. a.

(2) See post. 286. a. & b. 393. a.

(3) Acc. in Brediman's case, 6. Co. 58. b.

shall distreine for a rent of forty shillings within my mannor of S. this by construction in law shall amount to a grant of a rent out of my mannor of S. in fee simple or fee taile; for if this shall not amount to a grant of a rent, the grant shall be of little force or effect, if the grantee shall have but a bare distresse and no rent in him; for then he shall never have an assise of this, &c. And this is the reason, that it is so often ruled and resolved *, that this amounts to a grant of a rent *per construction* of law, *ut res magis valeat*. And all this is necessarily implied in the (Etc.) and in this case the grantee shall not have a writ of annuity, as our author saith. And whereas our author putteth his case where the distresse is to be taken in the same land out of which the rent by construction of law is issuing, hereby is implied, that if a rent be granted out of the mannor of D. and the grantor grant over, that if the rent be behinde, the grantee shall distreine for the same rent in the mannor of S. this is but a penalty in the mannor of S. for three causes.

First, the law needs not to make construction that this shall amount to a grant of a rent, for here a rent is expressly granted to be issuing out of the mannor of D. and the parties have expressly limited out of what land the rent shall issue, and upon what land the distresse shall be taken, and the law will not make an exposition against the expresse words and intention of the parties, which this way stands with the rule of the law. *Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est*.

Secondly, if in this case this shall amount to a grant of a rent out of the mannor of S. then the grantor shall be twice charged. For if the grantee bringeth a writ of annuity, this shall extend onely to the mannor of D.; for upon the grant of a distresse in the mannor of S. no writ of annuity lyeth, because the mannor of S. is only charged, and not the person of the grantor as to this (3); and for this cause the bringing of the writ of annuity cannot discharge the mannor of S. of any rent: and so the law by construction against the words and the intention of the parties shall doe injury to the grantor to charge him twice.

Thirdly, if in such case the mannor of S. in which the distresse is only limited, shall be in another county, then it hath beene often adjudged, that the rent shall not issue out of the same, but the distresse shall be as a meane and remedy to compell the tenant of the land to pay the rent. And it was said, that there was no diversity in reason, that the law in construction shall make the rent to be issuing out of this, when it lyeth in the same county, and not when it lyeth in severall counties; for the words in both cases are all one, and there is no reason to say that he shall faile of a recovery by assise (4). And the bookes in 1. Aff. p. 10. and 1. E. 3. 21. and other bookes doe not say that the rent issueth in this case out of both, but that the land in which the distresse shall be taken is charged; and this is true, for it is charged with the distresse. And inasmuch as it was charged with the distresse, their opinion was, that the tenants of both of them shall be named in the assise. And the opinion of *Finchden*, in 41. E. 3. 13. was affirmed to be good law, that if the mannor of D. out of which the rent is granted, be recovered by an elder title, that all the rent is extinct (5); but if the man-

nor

* 3. E. 3. 12.
3. Aff. p. 7.
14. Aff. p. 14.
16. E. 3. tit.
Grants 64.
18. E. 3. 32.
26. Aff. 38.
30. Aff. 12.
46. E. 3. 18. 32.
3. H. 4. 19.
9. H. 6. 9.
22. H. 6. 11.
(5. Co. 55.
Post. 213.)

Vide Bulwar's
case. 7. Co. 3.
1. Aff. p. 10.
1. E. 3. 21.
Vide 9. E. 3. 13.
31. Aff. 27.
17. E. 4. 6.
10. Aff. 4.
10. E. 3. 18.
2. E. 2. Aff. 360.
1. Aff. 10.
3. Aff. 7.
32. H. 6. 27.
22. Aff. 66.
31. Aff. 27.
29. E. 3.
Assise 366.
41. E. 3. 13.
per Finchden.

(3) Acc. art. 146. b.
(4) [See Note 242.]

(5) [See Note 243.]

[47. b.]

nor of *S.* in which the distresse is limited, be evicted, yet all the rent remains *. So if the grantee purchase parcell of the mannor of *S.* the rent is not extinct, for that the rent issueth onely out of the mannor of *D.* (1). And it is said, that if a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distreine for the rent in one of the acres, this rent is entire, and cannot be a rent secke out of two acres, and a rent charge out of the third acre, and therefore it is a rent secke for the whole; and yet hee shall distreine for this in the third acre. So if a rent be granted to two and to their heires out of an acre of land, and that it shall be lawfull for one of them and his heires to distreine for this in the same acre, this is a rent secke; for insomuch as they stand joyntly seised of one intire rent, it cannot be as to the one a rent secke, and as to the other a rent charge, and this distresse is as an appurtenant to the rent: and therefore if he which hath the rent dieth, the survivor shall distreine; and if both grant over the rent to another, he shall distreine for this. But if a man grant a rent out of Blacke Acre to one and to his heires, and grant to him that he may distreine for this in the same acre for terme of his life, this is a rent charge for his life, and a rent secke after, *diversis temporibus*. Otherwise it is if the distresse be limited for certaine yeares in the same land, there this remains a rent secke intirely, for that the fee and the freehold is seck in such case.

* Vide 17. E. 4. 6. semblable case. Vide Sect. prox. sequen.

If a man seised of lands in fee (2), and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distresse (3). But if he had granted the rent only out of the lands in lease for terme of the life of the grantee, this had issued out of the terme, and the land had beene charged during the terme, if the grantee lived so long. (7: Co. 23.) (Plowd. 524. b. 525. a.)

If a man be seised of twenty acres of land, and grant a rent of twenty shillings *percipiend' de quâlibet acra terræ meæ*, (that is) out of every one acre of my land, this is a severall grant out of every severall acre, and the grantee shall have twenty pounds in all. 22. H. 6. 10. b.

A. doth bargain and sell land to *B.* by indenture, and before inrolment they both grant a rent charge by deed to *C.* and after the indenture is inrolled; some have said, that this rent charge is avoided; for, say they, it was the grant of *A.* and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute (4), it shall be the grant of *B.* and the confirmation of *A.* But if the deed had not beene inrolled, it had beene the grant of *A.* and the confirmation of *B.* and so *quâcunque viâ data* the grant is good (5).

(Cro. Cha. 1103. 217. Cro. Jam. 52. 53.)

(1) See further as to extinguishment of rent, *infra*.

(2) The case here stated is Butts' case, 5. Co. 23.

(3) See post. 196. b. & 197. a.

(4) 27. H. 8. c. 16.

(5) See 1. Com. Dig. 544. where most of the authorities on the relation of the inrollment of a bargain and sale to its execution are referred to. See also post. 186. a. and Hynde's case, 4. Co. 71. a.

Sect. 222.

I T E M, si home ad un rent charge a luy et a ses beires issuant hors de certain terre, s'il purchase ascun parcel de cel a luy et a ses beires, tout le rent charge est extinct, et l'annuitie auxy (6); pur ceo que rent charge ne poit per tiel maner estre apportion. Mes si home, que ad rent service, purchase parcel de la terre dont le rent est issuant, ceo n'extinguerat tout, mes pur le parcel. Car rent service en tiel cas poit estre apportion solongue le value de la terre. Mes si un tient sa terre de son seignior per le service de render a son seignior annuelment a tiel feast un chival, ou un esperon d'or, ou un clove, gylofer, et hujusmodi; si en tiel cas le seignior purchase parcel de la terre, tiel service est ale; pur ceo que tiel service ne poit estre sever ne apportion.

A L S O, if a man hath a rent charge to him and to his heires issuing out of certaine land, if hee purchase any parcell of this to him and to his heires, all the rent charge is extinct, and the annuitie also; because the rent charge cannot by such manner bee apportioned. But if a man, which hath a rent service, purchase parcel of the land out of which the rent is issuing, this shal not extinguish all, but for the parcel. For a rent service in such case may be apportioned according to the value of the land. But if one holdeth his land of his lord by the service to render to his lord yearly at such a feast a horse, a golden speare, or a clove, gilliflower, and such like; if in this case the lord purchase parcell of the land, such service is taken away; because such service cannot be severed nor apportioned.

"EXTINCT" commeth of the verbe *extinguere*, to destroy or put out; and a rent is said to be extinguished, when it is destroyed and put out.

(2. Inst. 303, 304.)

"Apportion." This commeth of the word *portio*, quasi *partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent, common, &c. or a making of it into parts.

[a] Doct. & Stud. lib. 2. cap. 16.
22. H. 7. 2.
21. E. 3. 58.
[b] 30. Aff. 12.
9. Aff. 22.
(1. Ro. Abr. 234.)
[c] 46. E. 3. 32.
14. Aff. p. 14.
26. Aff. 38.
(Ant. 146. b.)
[d] 8. H. 4. 19.
(Post. 303. b.)

[a] The reason of this extinguishment is, because the rent is intire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole, and cannot bee [b] apportioned (7). But by act in law it may, as hereafter. (8) shall be said. [c] If the grantee of a rent charge purchase parcell of the land, and the grantor by his deed reciting the said purchase of part granteth that hee may distreyne for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent or the same in quantity. And so it is [d] if a man by deed granteth a rent charge out of his land to a man for life, and granteth further by the same deed that he and his heires may distreyne in the land

[148. a.]

(6) In L. and M. and also in Roh. it is *anyenty* instead of *annuitie auxy*; and so the *tenf* requires.

(7) Acc. Sav. 69. Noy 5. the same doc-

trine prevails as to conditions and common appurtenant, and for a like reason. Post. 215. a. Ante 122. a.

(8) See post. Sect. 224. and fol. 164. a.

land for the same rent, this amounteth to a new grant of a rent in fee simple. (1)

But yet a rent charge by the act of the partie may in some case be apportioned. As if a man hath a rent charge of 20 shillings, he may release to the tenant of the land 10 shillings or more or lesse, and reserve part; (2) for the grantee dealeth onely with that which is his owne, viz. the rent, and dealeth not with the land, as in case of purchase of part. And so was it holden in the common place, *Hill*. 14. Eliz. which I myfelfe heard and observed. So [e] if the grantee of an annuity or rent charge of 20 pound grant 10 pound parcell of the same annuity or rent charge, and the tenant attorne, hereby the annuity or rent charge is divided (3).

And [f] when the rent charge is extinguished by his purchase of part of the land, he shall never have a writ of annuitie; because it was by the grant a rent charge, and he hath discharged the land of the rent charge by his owne act by purchase of part. And therefore he cannot by writ of annuity discharge the land of the distresse, as *Littleton* hath before (4) said. But if the rent charge be determined by the act of God or of the law, yet the grantee may have a writ of annuity. As if tenant for another man's life by his deed grant a rent charge to one for 21 yeares, *cesty que vie* dieth, the rent charge is determined; and yet the grantee may have during the yeares a writ of annuity for the arrerages incurred after the death of *cesty que vie*, because the rent charge did determine by the act of God and by the course of law. *Actus legis nulli facit injuriam*. The like law is, if the land out of which the rent charge is granted be recovered by an elder title, and thereby the rent charge is voyded, yet the grantee shall have a writ of annuity, for that the rent charge is avoyded by the course of law; and so it was holden in *Ward's case* above remembred against an opinion *obiter* in 9. H. 6. 42. a.

(1. Ro. Abr. 235.)
Hil. 14 Eliz.
[e] 9. H. 6. 12.
53. F. N. B.
152. D. E.

[f] 14. E. 4. 4.
22. E. 4. le
darrein case 51.
7. H. 6.
9. H. 6. 1.
5. H. 7. 33.

Ward's case cited
in 2. Co. in
Hayward's case
fo. 36.

9. H. 6. 42.

“*Car rent service en tiel case poet estre apportion.*” Whether this apportionment was at the common law, or by force of the statute of *quia emptores terrarum*, hath beene a question in our bookes. * And it appeareth by *Littleton*, that it was so at the common law; for when he citeth any thing provided by any statute, he citeth the statute, as he hath done this very act before. (5) *Littleton* speaketh here indefinitely of rent service, and there be divers kindes of rent services which are not within that statute; and yet such rent services are apportionable by the common law. As if a man maketh a lease for life or yeares reserving a rent, and the lessee surrender part to the lessor, the rent shall be apportioned. So if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned.

[g] So likewise if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for the rent is incident to the reversion. [b] So it is if tenant by knights service by his last will and testament in writing deviseth the reversion of two parts of the lands, the devisee shall have two parts of the rent.

inter *Collins* and *Harding*. (13. Co. 57.) [b] *Trin*. 43. Eliz. Rot. 243. inter *West* & *Lassels*. & *Hil* 1. 42. Eliz. Rot. 108. in communi banco inter *Ewer* & *Moyle*.

And

(1) [See Note 244.]

(2) See acc. in the comment on Sect. 537.
post. fol. 305. a.

(3) [See Note 245.]

(4) [See Note 246.]

(5) Ant. Sect. 216.

* *Brookes tit.*
Apportionment
28. 18. E. 3. 49.
22. Aff. 52.
3. Aff. 18.
18. E. 2.
Avowrie 218.
Vid. 6. Co. 1, 2.
in *Bruerton's case*. Vid. 8.
Co. 105, 106. in
Talbot's case.
(1. Ro. Abr.
234. Post. 215.)
[g] 14. H. 8. 12.
Vid. 8. Co. 79.
in *Wilde's case*.
Pasch. 39. Eliz.
Rot. 233. So
it was adjudged.

And these cases are in mine opinion rightly adjudged against a sudden opinion in *Hill. 6.* and *7. E. 6.* reported by serjeant *Bendloe* to the contrary. Note, what inconvenience should follow, if by the severance of the reversion the rent should be extinct.

“*Purchase parcell de la terre.*” This is intended of a fee simple, for if there be a lord and tenant of 40 acres of land by fealty and [148. b.]

[i] 32. H. 8. tit.
Extinguishment.
Br. 48. ii. Ed. 3.
Cessavit 21.
17 E. 3. 57. a.
(Goldsb. 44.
1. Ro. Abr. 938.
9. Co. 135.
1. Ro. Abr. 235.)

* 21. E. 4. 29.
9. E. 4. 1.
7. H. 6. 26.
4. H. 7. 6. b.
11. E. 3. Cessavit
21.
(1. Ro. Abr.
235.)
* 33. E. 3.
Dower 138.

* 30. Aff. p. 12.

* 27. E. 3. 88.

[k] 12. H. 4. 17.
17. Ed. 2.
Dower 164.
30. Aff. p. 12

[l] 20. H. 6. 3.
9. E. 4. 1, 2.
35. H. 8.
Dyer 56. 7. E. 6.
Dyer 82. 9. E. 3.
6. H. 4. 17.
(1. Ro. Abr.
235.)

[m] Doct. &
Stud. h. 2. c. 17.

20 shillings rent [i], if the tenant maketh a gift in taile, or a lease for life or yeares, of parcell thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole: for a rent service (saith *Littleton*) may be extinct for part, and apportioned for the rest; but a rent service cannot be suspended in part by the act of the partie, and in *esse* for other (1) part. So it is if the lessor enter upon the lessee for life or yeares into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. And where our bookes * speake of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. And yet by act in law a rent service may be suspended in part, and in *esse* for part. * As when the gardian in chivalrie entreth into the land of his ward within age, now is the seignorie suspended; but if the wife of the tenant be endowed of a third part of the tenancie, now shall she pay to the lord the third part of the rent. * And so it is if the tenant give a part of the tenancie to the father of the lord in taile, the father dieth, and this descends to the lord; in this case by act in law the seignorie is suspended in part and in *esse* for part, and the same law is of a rent charge. (2)

Likewise a seignorie may be suspended in part by the act of a stranger. * As if two joyntenants or coparceners be of a seignorie, and one of them disseise the tenant of the land, the other joyntenant or coparcener shall distreine for his or her moitie.

Concerning the apportionment of rents, there is a difference betwene a grant of a rent, and a reservation of a rent: for [k] if a man be seised of two acres of land, of one in fee simple, and of another in taile, and by his deed grant a rent out of both in fee, in taile, for life, &c. and dieth, the land intailed is discharged, and the land in fee simple remains charged with the whole rent; for against his owne grant he shall not take advantage of the weakness of his owne estate in part. [l] But if he make a gift in taile, a lease for life or for yeares of both acres, reserving a rent, the donor or lessor dieth, the issue in taile avoydeth the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned ratably according to the value of the land, as *Littleton* here saith.

[m] If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre: but if the recoverie be by a faint title by covine, then the rent is extinct for the whole, because he claimeth under the grantor.

If

(1) [See Note 247.]

(2) [See Note 248.]

If a man infeoffeth *B.* of one acre in fee upon condition, and *B.* being seised of another acre in fee granteth a rent out of both acres to the feoffor, who entred into the one acre for the condition broken, the whole rent shall issue out of the other acre; because his title is paramount the (3) grant. But if a man maketh a lease for life of Blacke Acre and White Acre, reserving two shillings rent, upon condition that if the lessee doth such an act, &c. that then he shall have fee in Blacke Acre, the lessee performs the condition, albeit now by relation he hath the fee simple *ab initio*, yet shall the rent be apportioned, for that the reversion of one acre whereunto the rent was incident is gone from the lessor; and so note a diversitie betweene a rent in grosse and a rent incident to a reversion, concerning the apportionment thereof. And yet in some cases a rent charge shall not be wholly extinct, where the grantee claimeth from and under the grantor. As if *B.* maketh a lease of one acre for life to *A.* and *A.* is seised of another acre in fee, *A.* granteth a rent charge to *B.* out of both acres, and doth wast in the acre which he holdeth for life, *B.* recovereth in wast; the whole rent is not extinct, but shall be apportioned; and yet *B.* claimeth the one acre under *A.* And so it is if *A.* had made a feoffment in fee, and *B.* had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct: and the reason hereof is, for that it is a maxime of law, that no man shall take advantage of his owne wrong, *nullus commodum capere potest de injuriâ suâ propriâ*; (4) and therefore seeing the wast and forfeiture were committed by the act and wrong of the lessee, he shall not take advantage thereof to extinguish the whole rent: and the whole rent cannot issue onely out of the other acre, because the lessor hath the one acre under the estate of the lessee, and therefore it shall be apportioned. * If the king give two acres of land of equall value to another in fee, fee taile, for life or yeares, reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned.

* Dyer Mich.
7. & 8. Eliz.
Manuscript.
The earle of
Huntingdon's
case.

Vid. F. N. B.
234. b. Briefe
de onerando pro
rata port.

“*Mes si un homme tient sa terre, &c. per service de render annuelment, &c. un cheval, ou un espeon d'or, &c. si en tiel case le seignior purchase parcel de la terre, tiel service est ale.* (5)

149. a.]

“*Chival.*” Nota, in Latine *destrarius* is a great horse, or a horse of service, of the French word *destrier*; *palfridus* a horse to travell on (1), of the French word *palfray*; and *runcinus* a nagge (you shall often read of them in records), it commeth of the Italian word *roncino*. But admit that parcell of the land holden by such entire service come to the lord by descent, whether shall the entire service wholly remaine, or be extinct? And it is holden, that in some cases it shall be extinct for the whole, as suit service, and such other entire annuall suit services. But if the service be to render yearly at such a feast a horse, or the like, and the tenant infeoffe the father of the lord of part, which descends, yet the feoffor shall hold by a horse, because the service was multiplied, and each of them, viz. the feoffor and the feoffee, held by a horse.

Anno 6. R. 1.
Rot. 5. War.
Bruerton's case.
6. Co. 2.
34. Ass. 15.
35. H. 6. Exec.
21. Pl. Com. 72.
40. E. 3. 40.
5. E. 2. tit.
Avowrie 206.
(2. Inst. 503.
8. Co. 105.)

A. hath

(3) See the case of dower, post. 150. a.

(4) [See Note 249.]

(5) [See Note 250.]

[149. a.]

(1) It is used in this sense in a writ in
F. N. B. 93. l.

A. hath common of pasture *sauns nombre*, in twenty acres of land, and tenne of those acres descend to *A.*: the common *sauns nombre* is entire and incertaine, and cannot be apportioned, but shall remaine. But if it had been a common certaine (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, of turbarie, of pischarie, &c. And yet in none of these cases, the descent, which is an act in law, shall worke any wrong to the *terre-tenant*; for he shall have that which belongeth to him, for the act in law shall worke no wrong (2).

F. N. B. 209.
40. E. 3. 40.

If three joyntenants hold by an entire yearly rent, as of a horse, or of a graine of wheat, and the tenants cesse by two yeares, and the lord recover two parts of the land against two of them, and the third saves his part by tendring of the rent, &c. and finding suretie; albeit the lord come to the two parts by lawfull recovery, grounded upon the default and wrong of the two joyntenants, yet shall the entire annuall rent be extinct (3).

Vid. Litt. cap.
tenant in com-
mon 71. b.
6. Co. 1. 2.
in Bruerton's
case. Litt. f. 49.
11. H. 7. 12. b.
24. H. 8.
Tenures 53.
Brookes.
35. H. 6. 6.
11. El. Dy. 285.
16. E. 3.
Avowrie 93.

If the tenant holdeth by fealty and a bushell of wheat, or a pound of comyn, or of pepper, or such like, and the lord purchaseth part of the land, there shall be an apportionment, as well as if the rent were in money: and yet if the rent were by one graine of wheat, or one seed of comyn, or one pepper corne, by the purchase of part, the whole should be extinct. But if an entire service be *pro bono publico*, as knights service, castle gard, cornage, &c. for the defence of the realme, or to repaire a bridge or a way, to keepe a beacon, or to keepe the king's records, or for advancement of justice and peace, as to ayd the sherife, or to be constable of *England* (4), though the lord purchase part, the service (5) remains. So it is if the tenure be *pro opere devotionis sive pietatis*, as to find a preacher, or to provide the ornaments of such a church; or *pro opere charitatis*, as to marry a poore virgin, or to bind a poore boy apprentice, or to feed a poore man. And so note a diversity betweene these cases and entire services for the private benefit of the lord.

Sect. 223.

MES si une home tient sa terre d'un auter, per homage fealtie et escuage, et per certaine rent, si le seignior purchase parcel de la terre, &c. en tiel cas le rent serra apportion, come est avant dit: mes uncore en cest case l'homage et fealty demurront entier a le seignior; car le seignior avera le homage et fealtie de son tenant pur le remnant de les terres et tenements tenus de luy, come il avoit adevant (1), pur ceo que tiels services ne sont pas annual services, et ne poient estre apportion, mes l'escuage poit et serra apportion solonque l'assurance et rate de la terre, &c.

BUT if a man hold his land of another, by homage fealty and escuage, and certaine rent, if the lord purchase part of the land, &c. in this case the rent shall be apportioned, as is aforesaid: but yet in this case the homage and fealty abide entire to the lord; for the lord shall have the homage and fealty of his tenant for the rest of the lands and tenements holden of him, as hee had before, because that such services are not yearly services, and cannot be apportioned, but the escuage may and shall bee apportioned according to the quantitie and rate of the land, &c.

“PUR-

(2) This same maxim is cited and applied ant. fol. 148. a.

(3) [See Note 251.]

(4) See post. 165. a.

(5) Acc. post. 149. b.

(1) In L. & M. &c. is here added.

"PURCHASE *parcel de la terre, etc.*" Here by this, &c. is implied that the reasons, wherefore homage and fealty remaine, and are not extinct in this case, are: First, because it can be no losse to the tenant, as it might in the case of an horse or other entire service; for there it may bee the remnant is not sufficient in value to pay it. Secondly, there is no land, but it must be holden by some service or other; and homage and fealty are the freest and least chargeable services to the tenant.

Bruerton's case.
ubi supra.
(6. Co. 10.)

5. E. 2. Avowrie
206.

[149. b.] "Pur ceo que tiel services ne sont passe annual services, &c." This is *ratio una*, but not *unica*, as it appeareth by that which hath beene said. If there be lord and tenant by fealtie and herriot service, and the lord purchase part of the land, the herriot service is extinct, (and yet it is not annuall, but to bee paid at the death of the tenant) because it is entire and valuable.

(Plowd. 96. a.)
Bruerton's case
6. Co.
Talbot's case
8. Co. 104.
8. H. 7. 11.
(Post. 176. b.
185. b.)

"Solonque l'affurance et rate de la terre, &c." Here is by this this (&c.) implied, that in some cases where it is entire and valuable, and not annuall, it shall not (as hath beene sayd) be extinguished by purchase of parts: * as knights service, which is to be performed by the body of a man, if the lord purchase part, yet the tenure by knights service remaines for the residue, *quia pro bono publico & pro defensione regni*; (2) but the escuage shall be apportioned, as here *Littleton* saith, because that is for the benefit of the lord, and yet it is casuall, and not annuall. And where our author speaketh of services, it is implied that a herriot custome, though it be entire, valuable, and not annuall, by the purchase of part shall not be extinct. On the other part, when the tenure is by an entire service, and the tenant aliens part of the tenancie, in what cases the rent shall be multiplyed, (that is) where the feoffor and the alienee shall pay the entire rent severally, (3) (for regularly it holdeth, that *quæ in partes dividi nequeunt solida à singulis præstantur*) and where not, you may read at large in my * Reports.

* 7. E. 3. 29.
Talbot's case.
8. Co. 104.

And by this (&c.) is also implied, that the apportionment shall not be according to the quantity of the land, but according to the quality or value thereof, (4) as by that which hath beene said appeareth.

* Bruerton's
case 6. Co. 1. 2.
Talbot's case
8. Co. 104.

Sect. 224.

IT E M, si home ad un rent charge, et son pier purchase *parcel de les tenements charges en fee, et morust, et cel parcel descend a son fits, que ad le rent charge, ore cel (5) charge serra apportion solonque le value de la terre, come est avantdit de rent service; pur ceo que tiel portion de la terre purchase per la pier ne vient al fits per son fait de mesne,*

AL S O, if a man hath a rent charge, and his father purchase parcell of the tenements charged in fee, and dieth, and this parcell descends to his sonne who hath the rent charge, now this charge shall be appportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the

(2) Acc. ant. 149. 3.

(3) Ant. 67. b.

(4) Acc. infra, Sect. 224.

(5) The word *rent* is here inserted in L. & M.

mesne, mes per discent et per course del ley.

the father commeth not to the sonne by his owne fact, but by descent and by course of law.

5. E. 2. Avowrie
200.

21. E. 3. 58. b.

34. Ass. 15. tit.
Apportionment.

b. 28. 9. Ass. 22.

30. Ass. pl. 12.

(Ant. 148. b.)

34. H. 6. 41. b.

9. Ass. 92.

5. R. 2. Annuity
21.

Pl. Com. 72.

35. H. 6. tit.

Execut. 21.

15. E. 4. 5.

NOTE here a diversity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the course of law. (6)

“*Purchase parcel de les tenements charges en fee.*” And so it is if the tenant giveth to the father of the grantee part of the land in taile, and this descend to the grantee, the rent shall be apportioned; and so by act in law a rent charge may bee suspended for one part, and in *esse* for another.

And so it is, if the father be grantee of a rent, and the son purchase part of the land charged, and the father dieth after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moitie.

If a man hath issue two daughters, and grant a rent charge out of his land to one of them, and dieth, the rent shall be apportioned; and if the grantee in this case enfeofeth another of her part of the land, yet the moity of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent. But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity faileth; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath beene said, (1) bring it for the whole.

[150. a.]

Annua nec debitum judex non separat ipsum.

Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided. If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided; for the duty is personall, and cannot be divided by act in law (2).

“*Ne vient al fitz per son fait demesne, mes per discent & per course del ley.*” If the father within age purchase part of the land charged, and alieneth within age and dyeth, the sonne recovereth in a writ of *dum fuit infra aetatem*, or entereth; in this case the act of law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the sonne hath the land by descent.

So it is in case the sonne recovereth part of the land upon an alienation by his father *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

5. E. 2. Avowry
206.

A man seised of lands in fee taketh a wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land

(6) Acc. ant. 147. b.

[150. a.]

(1) Ant. 144. b. near the end.

(2) Acc. 2. Ventr. 327. For other in-

stances of the indivisibility of debts and personal duties, see F. N. B. 46. a. Keilw. 106. a. Bro. Nov. Cas. pl. 52. 135. Hetl. 53. March. 56. 61.

land to the feoffor and his wife and to the heires of the husband, the husband dieth, the wife recovereth the moiety of her dower by the custome; the rent charge shall be apportioned, and she may distreine for five pound, which is the moiety of the rent (3). In which case two notable things are to be observed. First, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, she shall not have her entire rent out of the residue; for a relation or fiction of law shall never worke a wrong or charge to a third person, but *in fictione juris semper est æquitas*. Secondly, that albeit her owne act doe concurre with the act in law, yet the rent shall be apportioned.

3. Co. 29. in
Butler and
Baker's case.

Sect. 225.

ITEM, *si soit seignior et tenant, et le tenant tient de son seignior per fealty et certaine rent, et le seignior granta le rent per son fait a un autre, &c. reservant a luy le fealty, et le tenant atturna al grantee de le rent, ore tiel rent est rent seck a le grantee; pur ceo que les tenements ne sont tenus del grantor (5) de le rent, mes sont tenus del seignior que reserve a luy fealtie.*

AL S O, if there bee lord and tenant, and the tenant holds of his lord by fealtie and certaine rent, and the lord grant the rent by his deed to another, &c. reserving the fealty to himselfe, and the tenant atturnes to the grantee of the rent, now this rent is rent seck to the grantee; because the tenements are not holden of the grantor of the rent, but are holden of the lord who reserved to him the fealtie.

“ ET *le seignior granta le rent, &c.*” So it is if the lord release the rent of the tenant saving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure release all his right in the land saving his said rent, the seigniorie remaines, and he shall have the rent as a rent service, and the fealty incident to it; for the said rent is as much as to say the rent service whereunto fealty is incident.

12. E. 4. 11.
9. E. 3. 1.
40. E. 3. 22. b.
13. E. 3. tit.
Releases 36.
(Post. 151. a.)

And if the lord hath issue two daughters and dieth, and upon partition the fealtie is allotted to the one and the rent to the other, she shall have the rent as a rent secke.

17. E. 3. 72. b.

If there be lord of a manor and tenant by fealty, suit of court and rent, the lord grants the fealty saving to him the suit of court and rent, the saving is good for the rent, but not for the suit of court; because the grantee can keepe no court, and there is no tenure of the grantor, and therefore the suit of court is lost and perished in that case.

17. E. 3. 72. b.

If the donee hold of the donor by fealty and certaine rent, and the donor grant the services to another, and the tenant attorne, some have said the rent shall not passe, because the rent cannot passe but as a rent service, being granted by the name of services; and the fealty

(3) This same case is cited and approved of in Ascough's case, 8. Co. 135. b.

(4) See the case of condition, ant. 148. b.

(5) Grantee instead of grantor in L. and M. and Roh. which is agreeable to the sense of the passage.

[e] 9. E. 3. 1.
(Ant. 150. 2.)

vered. And albeit fealty cannot bee divided from homage by grant (as hath beene said) yet by extinguishment it may [e]. As if there be lord and tenant by homage fealty and rent, and the lord release the seigniory and services, or all his right in the land saving the fealty and rent, or saving the said rent, or if he by expresse words release the homage saving the fealty and rent, there the fealty and rent remain, for the homage is extinct. And so note a diversity betweene a grant and a release in that case. But so long as homage continues, the fealty cannot be divided from it.

“*Forsque come services, &c.*” Here is implied a diversity betweene these corporall services of homage fealty and escuage, which cannot become secke or dry, but make tenure whereunto distresses escheats and other profits bee incident, and other corporall services, as to plough, repaire, attend, and the like, and all rents whatsoever, for they may become secke or dry and make no tenure.

Sect. 227.

MES auterment est de rent, que fuit un foits rent service; pur ceo que quant il est sever per le grant le seignior de les auters services, il ne poet estre dit rent service, pur ceo que il ne ad a ceo fealty, que est incident a chescun manner de rent service; et pur ceo est dit rent secke (1). Et le seignior ne poet grant tiel rent ove distresse, come est dit.

BUT otherwise it is of a rent, which was once rent service; because when it is severed by the grant [151. b.] of the lord from the other services, it cannot bee said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck. And the lord cannot grant such a rent with a distresse, as it is said.

“*ET le seignior ne poet grant tiel rent ove distres, come est dit.*”
[f] 7. E. 3. 2, 3. [f] For the distresse is an incident inseparable to the
[g] 7. E. 4. 11. fealty, as hath been said [g], and therefore a release of distresse is
3. H. 7. 4, 5. void.

“*Incident,*” *Incidens*, a thing appertaining to or following another as a more worthy or principall; whereof you see here, and in divers other places of *Littleton*, examples. And of incidents, some be sepearable, and some inseparable (2), as hath beene said.

(1) The words which follow in this Section are not in L. and M. nor in the Roh. edition; nor in the two MSS.
(2) [See Note 256.]

Sect. 228.

ITEM, si home lessa a un auter terres pur terme de vie, reservant a luy certain rent, s'il grant le rent a un auter per son fait, savant a luy le reversion de la terre issint lessé, &c. tiel rent n'est forsque rent seck; pur ceo que le grantee n'ad riens en le reversion del terre, &c. Mes s'il grant le reversion del terre a un auter pur terme de vie, et le tenant attorne, &c. donques ad le grantee le rent come rent service; pur ceo que il ad le reversion pur terme de vie.

AL SO, if a man lett to another lands for tearme of life, reserving to him certaine rent, if hee grant the rent to another by his deed, saving to him the reversion of the land so letten, &c. such rent is but a rent seck; because that the grantee had nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for tearme of life, and the tenant attorne, &c. then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.

“**S**AVANT a luy le reversion, &c.” By this word (&c.) is to be observed [b], that this rent reserved is a rent service, and hath fealty incident to it; and both rent and fealty are incident to the reversion, viz. [i] the rent incident to the reversion separably; but the fealty incident to the reversion inseparably; but by the grant of the rent, the fealty in this case shall not passe, because the fealty is inseparably incident to the reversion, but the grantee shall have the rent as a rent secke. Also by this (&c.) is implied an attornment of the tenant; for without that, although by the grant the rent is turned to a rent secke, so as the tenant cannot be charged with any distresse, yet to the passing thereof there must be an attornment.

[b] 41. E. 3. 16.

[i] 12. E. 4. 3.
32. H. 8. tit.
Patents. Br.
26. Aff. 66.
48. E. 3. 9. b.
Doct. & Stud.
li. 2. ca. 9.

“**A**ttorne, &c.” Here is implied by this (&c.) an attornment in the life of the grantee, and other incidents to an attornment, whereof you shall reade at large in the Chapter of Attornment (3).

“**D**onques ad le grantee le rent come rent service; pur ceo que il ad le reversion pur terme de vie.” And the reason hereof is, because the rent is incident to the reversion, as hath beene said, and (as Littleton saith here) passeth away by the grant of the reversion as with the superior, without saying *cum pertinentiis* (4) &c. for the reversion cannot be seck (5). But by the grant of the rent the reversion doth not passe (6).

(3) Post. 309. a.

(4) Acc. ant. 121. b. post. 307. a.

(5) [See Note 257.]

(6) See acc. from Littleton himself at the end of Section 229.

Sect. 229.

[152. a.]

ET issint est a entendue, que si home dona terre ou tenements en le taile rendant a luy et a ses heires certaine rent, ou lessa terre pur terme de vie rendant certaine rent, s'il granta le reversion a un autre, &c. et le tenant atturra, tout le rent et service passe per cest parol (reversion) pur ceo que tiel rent et service en tiel cas sont incidents a le reversion, et passent per le grant de le reversion. Mes coment que il granta le rent a un autre, le reversion ne passa my per tiel grant, &c. (1)

AND so it is to be intended, that if a man give lands or tenements in taile yeilding to him and to his heires a certaine rent, or letteth land for tearme of life rendring a certaine rent, if hee grant the reversion to another, &c. and the tenant atturra, all the rent and service passe by this word (reversion) (2) because that such rent and service in such case are incident to the reversion, and passe by the grant of the reversion. But albeithat hee granteth the rent to another, the reversion doth not passe by such grant, &c. (3)

THIS needs no explication, but is evident by that which hath formerly beene said, saving by this (&c.) in the end is implied the old rule, That the incident shall passe by the grant of the principall, but not the principall by the grant of the incident. *Accessorium non ducit, sed sequitur suum principale.* (4)

Sect. 230. (5)

ISSINT nota le diversite. Et issint est tenuis P. 21. E. 4. Mes il est adjudge, an. 26. lib. assisarum, que les services del tenant en taile fueront grants, que ceo fuit bone grant, nient obstant que le reversion demurt.

SO note the diversity. And so it is holden P. 21. E. 4. But it is adjudged 26. of the book of assises, where the services of tenant in taile were granted, that this was a good grant, notwithstanding that the reversion remaine.

THIS is added to *Littleton*. And therefore as I have done heretofore, and shall doe hereafter in like cases, I passe it over. And the case here cited in 26. *Aff. p. 66.* was *contra opinionem multorum*; and afterwards that judgement was reversed by writ of error, for that the services remained with the reversion as incidents (6) inseparable.

(1) The same distinction between granting the reversion and granting the rent is taken post. Sect. 572.

(2) According to Bro. Nouv. Cas. pl. 192. this holds in the case of the king as well as in the case of a common person.

(3) See ant. 150. b. 2. Ro. Abr. 59. &

infra note b.

(4) See ant. 151. a. note 3. and post. 349. b.

(5) No part of this Section is in L. & M. Roh. or P.

(6) [See Note 258.]

Sect. 231.

ITEM, si soit seignior mesne et tenant, et le tenant t'ent del mesne per service de v. s. et le mesne tient ouster per service de xii. d. si le seignior paramont purchase le tenancie en fee, donques le service de le mesnaltie est extinct; pur ceo que quant le seignior paramont ad le tenancie, il tient de son seignior procheine paramont a luy, et s'il doit tener ceo de luy que fuit mesne, donques il tiendra un mesne tenancie immediate de divers seigniors per divers services, que serroit inconvenient, et la ley voit plus tost suffer un mischiese que un inconvenience, et pur ceo le seigniorie del mesnaltie est extinct.

AL S O, if there bee lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of 12 pence, if the lord paramont purchase the tenancie in fee, then the service of the mesnalty is extinct; because that when the lord paramont hath the tenancie, he holdeth of his lord next paramont to him, and if he should hold this of him which was mesne, then he should hold the same tenancie immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief then an inconvenience, and therefore the feigniorie of the mesnalty is extinct.

"SI soit seignior mesne et tenant, &c. si le seignior paramont purchase le tenancie en fee, &c."

[52. b.]

[k] Some have said, that in this case it were reason, that by the purchase of the lord paramount his feigniorie should be onely extinct, and that he should become tenant to the mesne, and the mesne to hold over as the lord paramount held. But that cannot bee; for that one man cannot be both lord and tenant, nor one land immediately holden of divers lords. [l] If the tenant infeoffe the lord paramount and his wife and their heires, in this case the mesnalty is but suspended; for if the wife survive, both mesnalty and feigniorie are revived.

It is said, that if there be lord mesne and tenant, each of them by fealty and sixe pence, the lord confirme the state of the tenant, to hold of him by fealty and three pence, that the mesnalty is extinct. (1) [m] And so in the same case, if the tenant bee an abbot, and the lord confirme his estate to hold of him in frankalmoigne, the mesnalty is (2) extinct. [n] So it is if the lord release to the tenant (3). For whether the lord purchase the tenancie, or the tenant the feigniorie, the mesnalty is extinct. And albeit the mesne grant the mesnalty for life, and then the lord release to the tenant, both the reverſion and the estate for life are drowned. [o] So if there bee lord and tenant, and the tenant make a gift in taile, the remainder to the king, the feigniorie is extinct. (4)

[k] 20. E. 3. avowrie, 126.
2. E. 2. tit. Exting. 6.
26. H. 6. ibid. 7.

[l] 7. Aff. 2.
7. E. 3. 20.

[m] 4. E. 3. 19.
See for this hereafter in the chapter of Confirmation, Sect. (538.)
[n] 8. H. 6. 24.
(Post. 280. a.)
[o] 4. & 5. P. & M. Dy. 145.
(2. Co. 92. b.)

"Que ferra inconvenient." Here it appeareth, that *argumentum ab inconvenienti* is forcible in law, as hath been said before, (5) and shall be often observed hereafter.

"Lc

(1) [See Note 259.]

(2) [See Note 260.]

(3) [See Note 261.]

(4) [See Note 262.]

(5) Ante 97. b.

[p] 13. H. 4. 3.
40. Aff. p. 27.
12. R. 2.
Vouch. 81.

[p] “ *Le ley voet plus tost suffer mischiese que inconvenience.*”
(6) *Lex citius tolerare vult privatum damnum, quam publicum malum.*
Here be two maximes of the common law.

First, that no man can hold one and the same land immediately of two severall lords.

Secondly, that one man cannot of the same land be both lord and tenant. And it is to be observed, that it is holden for an inconvenience, that any of the maximes of the law should be broken, though a private man suffer losse; for that by infringing of a maxime, not onely a generall prejudice to many, but in the end a publike incertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non* (7) *debet, et factum unius alteri nocere non debet*; which are true with this exception, unlesse an inconvenience should follow, as our author here teacheth us.

Sect. 232.

MES tant que le tenant tenust del mesne per v. s. et le mesne tenust forsque per xii. d. issint que il avoit plus en advantage per iii. s. que il payast a son seignior, il avera les ditz iii. s. come rent seck annuellement de le seignior que purchase le tenancie.

BUT in as much as the tenant holds of the mesne by five shillings, and the mesne hold but by twelve pence, so as he hath more in advantage by foure shillings, than he paies to his lord, he shall have the said foure shillings as a rent secke yearly of the lord which purchased the tenancie.

“ **I**L avera le iii. s. come rent secke.”

And yet hee shall distreyne for it (1); for, seeing the fealtie is extinct, the law reserves the distresse to the rent; for as it hath been said in the like case, seeing the fealtie is extinct, the distresse by act in law may be preserved, *Quia quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest* (2).

[r] 13. H. 4.
Avowrie 237.
(Post. 225. b.
Mo. 36.)

[r] And therefore if a man maketh a lease for life, reserving a rent, and bind himselfe in a statute, and [the conusee] (3) hath the rent extended and delivered to him, he shall distreyne for the rent (4), because he commeth to it by course of law.

[s] 28. E. 3. 93.
(Ant. 150. b.
151. b. 300. b.)
[r] 31. Aff. 23.
22. Aff. 53.
2. H. 6. 14.

[s] But if a rent service be made a rent secke by the grant of the lord, the grantee shall not distreyne for it, for that the distresse remains with the fealtie. [1] If there be lord mesne and tenant, and the mesnaltie is a mannor having divers freeholders, and the lord purchase one of the tenancies, and there is a rent by surpluse, this rent albeit it be changed into another nature (as hath beene said) is parcell of the mannor. But yet by purchase of part of the land, the whole rent is extinct, albeit the law did preserve it.

(6) [See Note 263.]

(7) [See Note 264.]

also 11. Co. 52. a. Cro. Jam. 170. 189.
and Oldfield's case, Noy 123.

(3). The words, [the conusee] are not in the original, but are added by the editor as essential to the sense of the passage.

(4) [See Note 266.]

[153. a.]

(1) [See Note 265.]

(2) See same maxim ant. fol. 56. a. See

Sect.

Sect. 233.

IT E M, si home, que ad rent seck, est un foits seisi d'ascun parcel de le rent, et apres le tenant ne vout payer le rent aderere, ceo est son remedie. Il covient de aler per luy ou per autres a les terres ou tenements dont le rent est issuant et la demander les arerages del rent; et si le tenant denia ceo de payer, cest denier est un disseisin de le rent. Auxy, si le tenant n'avoit a lonques prist a payer, ceo est un denier, que st un disseisin de rent. (5) Auxy, si le tenant, ne nul autre home, soit demurant sur les terres ou les tenements par payer le rent quaut il demaund les arerages, ceo est un denier en ley, et un disseisin en fait, et de tiels disseisins il poit aver assise de novel disseisin envers le tenant, et recovers le seisin del rent, et ses arerages et ses dammages et les costages de son breve et de son plee, &c. Et si apres tiel recovery [et execution ewe] (1) † le rent soyt autre foits a luy denie, donque il avera un redisseisin, et recovers ses double damages, &c.

be againe denied unto him, then he shall have a redisseisin, and shall recover his double damages, &c.

AL S O, if a man which hath a rent secke, be once seised of any parcell of the rent, and after the tenant will not pay the rent behind, this is his remedie. Hee ought to goe by himsele or by others to the lands or tenements out of which the rent is issuing, and there demand the arerages of the rent; and if the tenant denie to pay it, this deniall is a disseisin of the rent. Also, if the tenant be not then readie to pay it, this is a denial, which is a disseisin of the rent. Also, if the tenant, nor any other man, be remaining upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a denial in law, and a disseisin in deed, and of such disseisins he may have an assise of novel disseisin against the tenant, and shall recover the seisin of the rent, and his arrearages and his damages, and the costs of his writ and of his plea, &c. And if after such recovery and execution had, the rent shall have a redisseisin, and shall re-

“**SEISIN**,” or *seison*, is common aswel to the English, as to (Ant. 29. a.) the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verbe.

“**D'ascun parcel.**” [u] A seisin of parcel is a sufficient seisin in law, to have an assise of the whole rent. [u] 5. E. 4. 2. (Pott. 315. a. Cro. Cha. 507.)

Concerning the generall learning of seisins, you may reade *lib. 4. (9. Co. 23.) Bevil's case, fol. 8. lib. 5. fol. 98. lib. 6. fol. 57. lib. 7. fol. 24. 29. T. 18. E. 1. lib. 9. fol. 33.* and many authorities of law there cited, but sufficient coram rege Nott. in Thesaur.

“**A les terres, &c.**” [w] For a demand of the tenant out of the land is not sufficient: but if there be a house and land a demand on the land is sufficient; but for a condition broken, it ought to be at the house (6), as hath beene said before (7). [w] 49. E. 3. 14. b. 14. E. 4. 4. Pl. Com. 71.

153. b.] “**Arere.**” This word *arere* is to bee observed, for it is not necessary, that the grantee of the rent should demand it at the very time

(5) The words *de rent* not in L. and M. nor Roh.

(6) Acc. F. N. B. 179. A.

(7) Acc. post. 201. b.

(1) † The words between brackets not in L. and M. Roh. nor P.

(Ant. 144. a.)

[x] 29. Aff. 51.

8. H. 6. 11.

Lib. de Entries

79. b.

(5. Co. 56.

7. Co. 28.

1. Leon. 305.

Cro. Jan. 9, 10.

145.)

[y] Mich.

41. E. 3. coram

rege adjudge

accordingly.

time when it becommeth due, but at any time after it is sufficient. For this is not like a demand of a rent upon a condition; because that is penall and overthroweth the whole state; and [x] therefore the time of demand must be certaine, to the end the lessee, donee, or feoffee may be there to pay the rent (2). But a demand of a rent secke or rent charge is but onely a formal meane to recover that which is due; [y] and therefore in that case it may be demanded after it is behinde at any time, whether the tenant be present or no, for remedies for rights are ever favourably extended.

(Post. 201. b.)

"*Ceo est un denier en ley.*" For wheresoever there is a lawfull demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a deniall in law, (3) albeit there be no words of denyall. It appeareth here, that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there can be no denier in deed, or in law.

[z] Vid. Bract.

lib. 4. fol. 161,

162. 204.

Brit. ca. 42, 43,

2c. f. 83. 106.

114, 115. 118.

Mir. ca. 2. sect. 1.

* Flet. lib. 4.

ca. 1. Bra. ubi

supra.

(4. Leon. 48. a.

Cro. Cha. 303.)

Mirr. ca. 2. sect.

25. Bracton

lib. 4. ca. 4.

Britton ca. 44,

45, &c. Fleta

lib. 4. ca. 5, &

2. & 3.

Mirror ca. 2.

sect. 25.

"*Disseisin.*" (4) [z] *Disseisina* is a putting out of a man out of seisin, and ever implyeth a wrong. (5) But dispossessing or ejectment is a putting out of possession, and may bee by right or by wrong. * *Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo forte ingreditur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseisinam sed transgressionem, &c. Querendum est a iudice quo animo hoc fecerit, &c.* (6) And of ancient time a disseisin was defined thus: *Disseisin est un personel trespassse de torious ouster del seisin* (7).

"*Affise de novel disseisin,*" *Affisa novæ disseisinæ.* *Affisa* properly commeth of the Latin word *affideo*, which is to associate or set together; so as properly affise is an association or sitting together. And the writ, whereby certain persons are authorised and called together, is called *affisa novæ disseisinæ*; so as *affisa* is but *cessio* (8). But because *cessio* is but a generall word, therefore in this sense *affisa* is used in law for a particular cession by force of the writ *de affisa novæ disseisinæ*; and accordingly it was anciently said, *affise in un case n'est auter chose que cession des justices.* And it is called *affisa novæ disseisinæ*, for that the justices of eire, before whom these affises were taken in their proper counties, did ride their circuits from 7 years to 7 years, and no disseisin before the eire if it were not complained of in the eire could be questioned after the eire; and therefore a disseisin committed before the last eire was called an ancient disseisin, and a disseisin after the last eire was called a new disseisin, or *novæ disseisina*. *Affisa* also signifieth a jury, of their sitting together, and also a session of parliament, as *Littleton* hereafter in this Chapter sheweth.

(7. Co. 3. b.)

"*Et recovers le seisin del rent.*" Here, and by the (&c.) in the end of this Section is implied, that our author intendeth his case where

(2) [See Note 267.]

(3) For disseisin of rent by denial, see post. Sect. 238.

(4) See Littleton's description of disseisin, post. Sect. 279.

(5) It also implieth force. Post. 257. b.

(6) The preceding passages in Latin are not from Bracton or Fleta in the places cited by lord Coke, but from Bract. 216. b.

(7) [See Note 268.]

(8) It should be *sessio*, the word as Coke spells it tending to a wrong derivation.

where the rent issueth out of lands in one county. For if a man be seised of two acres of land in two severall counties, and maketh a lease of both of them reserving two shillings rent; in this case, albeit severall liveries (9) be made at severall times, yet is it but one entire rent in respect of the necessitie of the case, and he shall distreine in one county for the whole, and make one avowrie for the whole. But he shall have severall assises in *confinio comitatûs*, and in

154. a.]

either countie shall make his plaint of the whole rent; but there shall be but one patent to the justices. [a] And this assise in *confinio comitatûs* is given by the statute of 7. R. 2. cap. 10. for no assise lay in that case at the common law, but the party might distreine. [b] But for a common of pasture, of turbary, of pischary, of estovers, and the like, in one county, appendant or appurtenant to land in another county, an assise in *confinio comitatûs* did lye at the common law; [c] and so it is of a nusans done in one county to lands, lying in another county, the like assise did lye at the common law.

[d] And albeit the counties doe not adjoyne, but there be 20 counties meane betweene them, yet the assise in *confinio comitatûs* doth lye (1), and the justices shall sit betweene the said counties. [e] And where it is said before of two counties, the like law it is if the same extend into more counties (2).

[f] If a man hold divers mannors or lands in divers severall counties by one tenure, and the lord is deforced of his services, he shall have severall writs of customes and services; for every county one writ returnable at one day in the court of common pleas, and thereupon count according to his case by the common law.

[g] But if the tenant in that case doe cease, the lord shall not have severall writs of *cessavit ut supra*; for the writ of *cessavit* is given by statute *, and the forme and manner of the writ therein prescribed; and thereupon it is holden in our bookes that in that case a *cessavit* doth not lye. (3)

[h] *Il avera un redisseisin & recouvrera ses double damages, &c.* Here by this (&c.) is also to be understood, that a writ of redisseisin is given by the statute of Merton * (so called because the parliament was holden at Merton in Anno 20. H. 3.) the letter whereof is, *Item si quis fuerit disseisitus de libero tenemento, & coram iusticiariis itinerantibus seisinam suam recuperaverit per assisam novæ disseisinæ, vel per recognitionem eorum qui fecerint disseisinam, & ipse disseisitus per vicecomitem seisinam suam habuerit, si iidem disseisitores, postea post iter iusticiariorum, vel infra, de eodem tenemento iterum eundem conquerentem disseisiverint. & inde convicti fuerint, statim capiantur, &c.* (4) But the double damages are given by the statute of W. 2. cap. 26. (5)

And

(9) As to livery of lands situate in severall counties, see ant. Sect. 61, 62.

[154. a.]

(1) Acc. Finc. Descript. del Com. L. 59. a. & 49. Ass. pl. 1. & 21. Hen. 6. 3. there

cited.

(2) [See Note 269.]

(3) Acc. F. N. B. 209. K.

(4) Acc. 2. Inst. 82. 115.

(5) See 2. Inst. 416.

[a] 10. Ass. pl. 4. 18. Ass. p. 1. & 18. E. 3. 32. 22. H. 6. 9, 10.

[b] F. N. B. 180. a. (7. Co. 2, 3, 4.)

[c] F. N. B. 183. k.

[d] 5. E. 4. 2.

[e] F. N. B. 180. a.

[f] 30. E. 1. tit. Droit. F. N. B. 151. m.

[g] 18. Ass. pl. 1.

* W. 2. cap. 21.

[h] Bracton fol. 236. Britton 133. 246. Fleta lib. 4. cap. 29. Merton cap. 3. Regist. 206, 207.

* Mirror ca. 3. W. 2. c. 46. Vid. Sect. 234.

Vide Regist. 206. b. (1. Ro. Abr. 571.)

[i] 40. Aff. 23.
ac.

[k] 14. E. 4. 4.
11. H. 6. 22.
(Ant. 6. a.
19. b.)

[l] Fitz. N. B.
180. h.

And *Littleton* in few words hath made a good exposition of this statute; for where the statute saith, *disseisitus de libero tenemento*, *Littleton* expounds it [i] to extend to a rent secke or rent charge. (6) Albeit, as hath beene said, they be against common right, yet a man hath a freehold in them, [k] and he that granteth *omnia tenementa sua*, a rent charge or a rent secke doth passe. (7)

Coram iusticiariis itinerantibus, &c. saith the statute. But *Littleton* speaketh generally, and so is the statute to be intended before any other justices that have authority to take assises, and justices itinerant are set downe but for an example, which is worthy of the observation, [l] being a penall law.

Recuperaverit per assisam, &c. saith the statute. Here *assisa* is taken for the verdict of the assise, as *Littleton* hereafter in this Chapter expoundeth the same. *Vel per recognitionem*, &c. or by confession. Then the question is, what if the recovery were upon a demurrer, or by pleading of a record and failer of it, or by any other manner. And seeing *Littleton* speaketh generally, it must be understood of all manner of recoveries in an assise of *novel disseisin*; and so it is confirmed by the statute of W. 2. cap. 26. (8)

“*Recoverie.*” *Recuperatio* commeth of the verbe *recuperare*, i. e. *ad rem per injuriam extortam sive detentam per sententiam iudicis restitui*. And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alicujus rei in causam alterius abductæ per iudicem acquisitio*.

“*Et execution erwe.*” *Per vicecomitem seisinam habuerit*, saith the statute; but *Littleton* speaketh generally, (*et execution erwe*) and execution had; so as whether it bee by the sherife or by the party, so as execution or possession be had, it sufficeth. (9)

Vide Sect. 504.

“*Execution.*” *Executio*, and signifieth in law the obtaining of actuall possession of any thing acquired by judgement of law, or by a fine executory levied, whether it be by the sherife or by the entry of the party, whereof you shall reade more hereafter. (10)

[m] 14. E. 2.
tit. Redif. 9.
F. N. B. 189. g.

Note, it appeareth here by *Littleton*, that [m] the recovery in a former writ must be in assise of *novel disseisin*, wherein these words (*tiel recoverie*) are to be observed. And therefore in a writ of right close in ancient demesne, the demandant maketh his protestation to sue in the nature of assise of *novel disseisin*, and after is redisseised, hee shall not have a writ of redisseisin, because the first recovery was not by writ of assise of *novel disseisin*. [n] And so it is, if the recovery were in assise of fresh force by bill according to the custome of some city or borrough. Also in ancient demesne there be no coroners. (11)

[n] 14. E. 3.
tit. Redif. 8.
Vide the 2. part
of the Institutes.
Stat. de Merton,
cap. 3.

[o] 9. H. 4. 5.
F. N. B. 189. c.
23. Aff. pl. 7.
(Cro. Jam. 334.)
(F. N. B. 188. c.)

Si iidem disseisitores, saith the statute. [o] So as it must be the same disseisors: but here *iidem* is taken for *non alii*. And therefore if the recovery in the assise were against two disseisors, and one of them redisseise him againe, he shall have a redisseisin against him, for he is not *alius*. But if the recovery had been against one,

[154. b.]

(6) Acc. F. N. B. 178. D.

(7) [See Note 270.]

(8) See further as to *redisseisin* Fitzherbert's comment on the writ of that name. F. N. B. 188. B.

(9) Acc. ant. 34. b. See also Dy. 278. b. March. 95.

(10) Post 289. a.

(11) [See Note 271.]

one, and he and another redisseise the plaintife, he shall not have a redisseisin; for here is *alius*; and he cannot have a redisseisin against the former disseisor alone, because he is jointenant with another; [p] for joyntenancy in a writ of redisseisin is a good plea, and a stranger shall not be subject to double imprisonment and double dammages.

[p] 33. E. 3.
Redisseisin 7.
(3. Co. 13. b.
Post. 198. a.)

[q] If a recovery be had against a woman in an assise of *novel disseisin*, and the plaintife recovereth and hath execution, the woman taketh husband, and both of them redisseise the plaintife, he shall not have a redisseisin, because the husband is *alius*. [r] And yet if a feme recover in an assise, and after take baron, and they are redisseised, the husband and wife shall have a redisseisin; because the husband joyneth for conformity, and it is in the right of his wife who was disseised before, so in effect it is *idem disseisitus & idem conquerens*. (1)

[q] 9. H. 4. 5.
F. N. B. 188. E.

[r] F. N. B.
188. E. Registr.
9. H. 4. 5.

(Hob. 96.)

If two coparceners be disseised and recover in an assise, if after they make partition, and after they be severally disseised, they shall have severall redisseisins; and so it is of joyntenants; for they be *idem conquerentes*, & *non alii*. Also a redisseisin doth lye against the disseisor which doth redisseise, and against another to whom he made feoffment after the second disseisin; for otherwise the redisseisor might prevent the plaintife of his redisseisin. But in an assise against *A.* and *B.* *A.* is found disseisor, and *B.* tenant, and the plaintife doth recover; and after he which was found tenant disseises the plaintife, he shall not have a redisseisin, because he did disseise him but once. (2)

De eodem tenemento, saith the statute. If the plaintife be redisseised of parcell of the tenement formerly recovered, he shall have a redisseisin.

F. N. B. 188. G.

If the mesne recovereth (3) a rent when it is a rent service, and after the rent becommeth a rent seck by surplussage, and doth redisseise him of the rent, he shall have a redisseisin; for the substance of the rent remaines, though the quality be altered. (4)

(Ant. 153. a.)

[f] If tenant in speciall taile recovereth in assise, and after becommeth tenant in taile after possibility of issue extinct, and then is redisseised, he shall have a redisseisin; for albeit the state of inheritance be altered, yet the same freehold remaineth. (5)

[f] 26. H. 6.
tit. Aid 77.

If a man recover land in an assise of *novel disseisin* whereunto there is a common appendant or appurtenant, and after is redisseised of the common, he shall have a redisseisin of the common, for it was tacitely recovered in the assise. (6)

8. E. 3. tit.
Redisseisin 6.
F. N. B. 189. p.

(1) [See Note 272.]

(2) See post. Sect. 278.

(3) Recovery in *assise* must be understood.

(4) [See Note 273.]

(5) Acc. 11. Co. 81. a. in Lewis Bowles's case.

(6) Other instances of tacit recovery are mentioned ant. fol. 151. a.

Sect. 234.

ET memorandum, que cest nosme assise est nomen æquivocum; car ascun foits est prise pur un jurie; car le commencement de le record de assise de novel disseisin issint commencera: assisa venit recognitura, &c. quod idem est quod jurata venit recognitura, &c. Et la cause est, pur ceo que per le brieve de assise il est command a la vicount, quod faceret duodecim liberos et legales homines de vicineto, &c. videre tenementum illud, & nomina illorum imbreviare, et quod summoneat eos per bonos summonitores, quod sint coram justiciariis, &c. parati inde facere recognitionem, &c. Et pur ceo que, per tiel original, un panel per force de mesme le brieve devoit estre retorne, &c. il est dit en le commencement del record en le assise, assisa venit recognitura, &c. Auxy, en brieve de droit il est communement dit, que le tenant luy poit mitter en Dieu et grand assise, &c. Auxy, il y ad un brieve en le register, que est appel brieve de magnâ assisâ eligendâ. Issint est ceo bien prove, que cest nosme assise aliquando ponitur pro jurat. Et ascun foits il est prise pur tout le brieve d'assise; et solonque cel entent il est plus proprement et plus communement prise, siccome assise de novel disseisin est prise pur tout le breve de assise de novel disseisin. Et en mesme le maner assise de common de pasture est prise pur tout le brieve d'assise de common de pasture, et assise de mortdauncester est prise pur tout le brieve d'assise de mortdauncester, et assise de darraïne presentment est prise pur tout le breve d'assise de darraïne presentment. Mes il semble, que le cause pur que tiels briefes al commencement fueront appels assises fuit, pur ceo que per chescun tiel brieve il est commande al viscount, quod summoneat xii, le quel est a tant a dire, que doit summoner un jurie. Et ascun foits

AND memorandum, that this name assise is nomen æquivocum; for sometimes it is taken for a jurie; for the beginning of the record of an assise of novel disseisin beginneth thus: assisa venit recognitura, &c. which is the same as jurata venit recognitura. And the reason is, for that by the writ of assise it is commanded to the sherife, quod faceret duodecim liberos & legales homines de vicineto, &c. videre tenementum illud, et nomina illorum imbreviare, et quod summoneat eos per bonos summonitores, quod sint coram justiciariis, &c. parati inde facere recognitionem, &c. And because that, by such an original, a pannell by force of the same writ ought to be returned, &c. it is said in the beginning of the record in the assise, assisa venit recognitura, &c. Also, in a writ of right it is commonly said that the tenant may put himselfe on God and the great assise. Also there is a writ in the register, which is called a writ de magnâ assisâ eligendâ. So as this is well proved, that this name assise sometimes is taken for a jury. And sometimes it is taken for the whole writ of assise; and according to this purpose it is most properly & most commonly taken, as an assise of novel disseisin is taken for the whole writ of assise of novel disseisin. And in the same manner an assise of common of pasture is taken for the whole writ of assise of common of pasture, and assise of mortdauncester is taken for the whole writ of assise of mortdauncester, and assise of darraïne presentment is taken for the whole writ of darraïne presentment. But it seemes, that the reason why such writs at the beginning were called assises was, for that by every such writ it is commanded to the sherife, quod summoncat 12, which

foits assise est prise pur un ordinance, scil. pur mitter certaine choses en certaine rule et disposition, sicome ordinance, que est appel (1) † *assisa panis et cervisiæ.*

which is as much to say, that hee ought to sommon a jury. And sometime assise is taken for an ordinance, to wit, to put certaine things into a certaine rule and disposition, as an ordinance, which is called *assisa panis et cervisiæ.*

“**ÆQUIVOCUM.**” (7) For the better understanding hereof, of these there bee two kinds, viz. *equivocum equivocans*; and *equivocum equivocatum*.

Equivocum equivocans est plurivocum, polysemus, a word of divers severall significations.

Equivocum equivocatum est univocum, that is to say, reduced to a certaine signification. As here in Littleton's example, *assisa est nomen equivocum equivocans*; for sometime it signifieth a jury, sometime the writ of assise, and sometime an ordinance or statute. Now assise, *jurata*, (8) is *equivocum equivocatum*; and so is *breve de assisâ novæ disseisinæ*, and *assisa panis*, &c. Even as *canis est nomen equivocum*; *canis latrabilis*, *canis marinus*, *canis cælestis*, *sunt equivocata*.

155. a.]

“*Assise de novel disseisin.*” Note [a], there be foure assises, viz. (2. Co. 70.) this writ, an assise of mortdancer, of durreine presentment, and of [a] *Bracton lib. 4. fo. 160. Britton ca. 42. fo. utrum.* (1)

105. 134. F. N. B. Fleta lib. 4. ca. 5. &c. Mirr. ca. 2. sect. 13.

“*Vicount.*” Vide Sect. 248. verbo (*Shireve.*)

(Ant. 109. b. Post. 168. a.)

“*Quod faciat 12 liberos et legales homines de vicineto*, &c.” [b] Albeit the words of the writ be *duodecim*, yet by ancient course the sherife must return (2) 24: and this is for expedition of justice: for if 12 should onely be returned, no man should have a full jury appear, or be sworn in respect of challenges, without a *tales*, which should be a great delay of tryals. So as in this case usage & ancient course maketh law. And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 *jurors* (3) for the tryall of matters of fact, [c] but 12 judges of ancient time for tryall of matters of law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve Counsellors of State. He that wageth his law must have eleven others with him, which thinke hee sayes true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, &c.

[b] 1. H. 7. 2.

[c] Vid. Pl. Com. in proœmio.

Joshua 4. Genes. 49.

[d] He that is of a jury, must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as hee stands unsworne. Secondly, he must bee *legalis*. And by the law every juror, that is returned for the tryall of any issue or cause, ought to have three properties.

[d] 9. E. 4. 16.

First,

(7) See Hob. 303.

(2) See 3. G. 2. c. 25. f. 8.

(8) Lord Coke means “taken for *jurata*.”

(3) [See Note 274.]

[155. a.]

(1)† The words *entre les auciens estatutes* are here added in L. & M. Roh. and P.

(1) *Juris utrum.*

(*) Artic. Super
Cart. ca. 9.
Regist. 178.
3. E. 3 30.

(*) First, hee ought to bee dwelling most neere to the place [155. b.]
where the question is moved. (2)

Secondly, he ought to bee most sufficient both for understanding,
and competencie of estate. (3)

Vid. Sect. 102.
193.

Thirdly, he ought to bee least suspitious, that is, to be indiffe-
rent as he stands unsworne: and then hee is accounted in law *liber*
et legalis homo; otherwise he may be challenged, and not suffered to
be sworne. (4)

9. H. 6. 37.

The most usual triall of matters of fact is by 12 such men; for
ad questionem facti non respondent iudices: and matters in law the
judges ought to decide and discusse; for *ad questionem juris non*
respondent juratores. (5)

[e] Vid. Artic.
super Cart. ca. 9.
Fortesc. ca. 25.
Sec. 29.

[f] Glanvil lib.
ca. 14, 15.

Bracton lib. 3.
fol. 116. a.

[g] Lamb. verb.
Centuria.

[b] Lamb. fol.
91. 3.

[e] For the institution and right use of this triall by 12 men,
and wherefore other countries have them not, and how this triall
excells others, see *Fortescue* at large, cap. 25, &c. et 29. [f] And
in ancient time they were 12 knights. This trial of the fact *per*
duodecim liberos et legales homines is very ancient; for heere what
the law was before the conquest. [g] *In singulis centuriis comitia*
sunt, atque liberæ conditionis viri duodecim ætate superiores unâ cum
præposito sacra tenentes jurato, &c. Nay the tryall, in some cases,
per medietatem linguæ, (as we speake) was as ancient. [c] *Viri duo-*
deni jure consulti, Angliæ sex, Walliæ totidem, Anglis et Wallis jus di-
cunt; and of ancient time it was called *duodecim virale judicium*. (6)

Now seeing we are justly occasioned, and the rather for the (Ec.)
herein, to speak of a challenge to jurors, to make the studious rea-
der capable of the understanding of the bookes of law concerning
this matter, it shall be necessary to say somewhat of challenges:
and, first, what a challenge is.

Challenge is a word common as well to the English as to the
French, and sometimes signifieth to claime, and the Latine word is
vindicare; sometime in respect of revenge to challenge into the
field, and then it is called in Latine *vindicare* or *provocare*; some-
time in respect of partiality or insufficiency, to challenge in court
persons returned on a jury. And seeing there is no proper Latin
word to signify this particular kind of challenge, they have framed
a word anciently written, [a] *chalmniare*, and *columpniare*, and *ca-*
lumpniare, and now written *calumniare*; and hath no affinity with
the verbe *calumnior*, or *calumnia*, which is derived of that, for that
is of a quite other sense, signifying a false accuser, and in that
sense [b] *Bracton* useth *calumniator* to be a false accuser: but it is
derived of the old word *caloir* or *chaloir*, which in one signification
is to care for or foresee. And for that to challenge jurors is the
meane to care for or foresee that an indifferent triall be had, it is
called *calumniare*, to challenge, that is, to except against them that
are returned to be jurors; and this is his proper signification.

[a] W. 2. ca. 32.
Vid. Stat. de
12. E. 2. de
esson. calumni-
andis. Fleta
lib. 1. cap. 32.
Britton fol. 6. a.
12. a. 118. &
134. 12. A. 10.
[b] Bract. lib. 3.
fol. 137.

[c] Bract. lib. 4.
fol. 257. Vet.
N. B. fol. 76.

[c] But sometimes a summons, *summonitio*, is said to bee *calum-*
niata, and a count to be challenged, but this is improperly. And
forasmuch as mens lives, fames, lands and goods, are to be
tryed by jurors, it is most necessary, that they be *omni exceptione*
maiores; and therefore I will handle this matter the more largely.

A chal-

(2) [See Note 275.]

(3) See post. 156. a.

(4) Of other modes of trying facts be-
that by jury, see ant. 74. a.

(5) [See Note 276.]

(6) See further on the origin of English

juries, Spelm. Gloss. voc. *jurata*, Dissertat.
Epistolar. in Ling. Septentrion. Thesaur.
Hickes. Stiernh. de jure Sueon. et Goth.
vetust. lib. 1. c. 3. and Dr. Pettingal's En-
quiry into the Use and Practice of Juries
amongst the Greeks and Romans.

[156. a.]

A challenge to jurors is twofold, either to the array, or to the polls: to the array of the principall pannell, and to the array of the *tales*. And herein you shall understand, that the jurors names are ranked in the pannell one under another; which order or ranking the jurie is called the array; and the verbe, to array the jurie; and so we say in common speech, *battaile array*, for the order of the *battaile*. And this array we call *arralementum*, and to make the array *arraire*, derived of the French word *arroier*; so as to challenge the array of the pannell is at once to challenge or except against all the persons so arrayed or impannelled, in respect of the partialitie or default of the sherife, coroner, or other officer that made the returne.

And it is to be knowne, that there is a principall cause of challenge to the array, and a challenge to the favour.

Principall, in respect of partialitie: As first, if the sherife, or other officers be of [a] kindred, or affinity (1), to the plaintife or defendant, if the affinity (2) continue [b]. Secondly, if any one or more of the jurie bee returned at the denomination of the partie, plaintife or defendant, the whole array shall be quashed. So it is if the sherife returne any one, that he be more favourable to the one than the other, all the array shall be quashed. [c] Thirdly, if the plaintife or defendant have an action of batterie against the sherife, or the sherife against either partie, this is a good cause of challenge. So if the plaintife or defendant have an action of debt against the sherife; (but otherwise it is if the sherife have an action of debt against either partie) or if the sherife have parcell of the land depending upon the same title [d]; or if the sherife, or his bailife which returned the jurie, be under the distresse of either partie; or if the sherife or his bailife be either of counsell, attourney, officer in see or of robes, or servant of either partie, gossip, or arbitrator in the same matter, and treated thereof. [e] And where a subject may challenge the array for unindifferencie, there the king being a partie may also challenge for the same cause, as for kindred, or that he hath part of the land, or the like: and where the array shall be challenged against the king, you shall reade in our bookes.

(2. Ro. Abr. 640. Dy. 319.)

38. H. 6. 6. (Mo. 3)

15. H. 7. 9. b.

45. Aff. 1.

20 H. 6. 39.

44 E. 3. 38.

27. Aff. 28.

8. Aff. 23.

3. H. 6. 24.

38. Aff. 19.

[d] 14. E. 3. 5.

7. E. 3. 56.

17. E. 2. Chall. 168.

22 E. 4. Chall. 63.

[c] 11. H. 4. 26.

22. E. 4. 1.

44. Aff. 23.

21. H. 7. 38.

4. E. 4. 11.

Stamf. 162. c.

38. E. 3. 25.

22. E. 4. 1.

20. H. 6. 34.

2. H. 4. 13.

4. E. 4. 11.

[e] 4. H. 7.

[a] 12. Aff. 36.

26. Aff. 31.

3. E. 4. 12.

31. Aff. 7.

29. Aff. 2.

22. E. 4. 2.

12. E. 3.

Chall. 114.

21. E. 3. 5. b.

3. H. 7. 5.

Pl. Com. 73.

15. H. 7. 9.

7 E. 6. Dier 78.

12. H. 6.

Chall. 159.

(Plowd. 425.

2. Ro. Abr. 638.)

[b] 21. E. 4. 74.

49. E. 3. 1.

15. E. 3. 43.

22. E. 3. 12.

9. E. 4. 46.

8. H. 5. 5.

28. Aff. 21.

41. E. 3.

Chall. 99.

38. E. 3. 25.

3. H. 6. 39.

33. Aff. 12.

44. E. 3. 43.

[c] 4. H. 7.

[f] By default of the sherife, when the array of a pannell is returned by a bailife of a franchise, and the sherife returne it as of himselfe, this shall be quashed, because the partie should lose his challenges. But if a sherife returne a jurie within a libertie, this is good, and the lord of the franchise is driven to his remedie against him.

If a peere of the realme or lord of parliament be demandant or plaintife, tenant or defendant, there must a knight be returned of his jurie, be he lord spiritual or temporall, or else the array may be quashed [g]: but if he be returned, although he appeare not,

Rutland's case. Plow. Com. 117. 27. H. 8. 22. 4. El. Dier 208. 8. Eliz. Di. Dier 318. 10. Eliz. Dier 265. b. (1. Leon. 5. 2. Ro. Abr. 636.)

[f] 39. Aff. 2.

17. E. 3. 50.

17. Aff. 11.

30. Aff. 5.

8. Aff. 3.

[g] 13. E. 3.

Chall. 115. Br.

Enquest. 100.

6. Co. 54.

Countess de

246. 14. Eliz.

yet

(1) [See Note 277.]

(2) [See Note 278.]

[d] 17. E. 2.
Attaint 69.

[e] 32. E. 4.
tit. Chall. 63.
Stanf. Pl. Cor.
19. Aff. 6. b.
4. H. 7. 8.
44. E. 3. 38.
(2. Ro. Abr.
645.)

[f] 8. H. 4. 22.
(Mo. 895.)

[g] 6. R. 2.
Chall. 102.

13. E. 3.
ibid. 108.

[m] 32. E. 3.
Chall. 110, 111.

32. Aff. 6.
38. Aff. 13.

[n] 34. H. 6.
Chall. 69.

8. H. 4. 22.
27. Aff. 20.

22. E. 3. 12.
Vid. 26. Aff. 21.

38. H. 6. 9.
7. H. 6. 25.

19. H. 6. 48.
20. H. 6. 38.

20. E. 4. 2.
22. E. 4.

Chall. 62.

[o] 22. E. 4.
Chall. 63.

4. H. 7. 8.

yet the jurie may be taken of the residue. And if others be joynd with the lord of parliament, yet if there be no knight returned, the array shall be quashed against all. [b] So in an attaint there ought to be a knight returned of the jurie (3).

[i] And when the king is partie, as in travers of an office, he that traverseth may challenge the array, as hereafter in this Section shall appeare; and so it is in case of life; and likewise the king may challenge the array: and this shall be tried by triors according to the usuall course. [k] The array challenged on both sides shall be quashed.

[l] And if two estrangers make a pannell, and not in favourable manner for the one partie or the other, and the sherife returns the same, the array was challenged for this cause, and adjudged good.

[m] If the bailife of a libertie returne any out of his franchise, the array shall be quashed, as an array returned by one that hath no franchise, shall be quashed.

Challenge to the array for favour. [n] He, that taketh this, must shew in certaine the name of him that made it, and in whose time, and all in certaintie. This kinde of challenge, being no principall challenge, must be left to the discretion and conscience of the triors. As if the plaintife or defendant be tenant to the sherife, this is no principall challenge; for the lord is in no danger of his tenant; but *è converso* it is a principall challenge; but in the other hee may challenge for favour, and leave it to triall. So affinitie betweene the sonne of the sherife and the daughter of the partie, or *è converso*, or the like, is no principall challenge, but to the favour; but if the sherife marrie the daughter of either partie, or *è converso*, this, (as hath beene said) is a principall challenge, or the like. [o] But where the king is partie, one shall not challenge the array for favour; &c. because in respect of his allegiance he ought to favour the king more (4). But if the sherife be a vadelect of the crowne, or other meniall servant of the king, there the challenge is good (5). And likewise the king may challenge the array for favour.

Note, upon that which hath been said it appeareth, that the challenge to the array is in respect of the cause of unindifferencie or default in the sherife or other officer that made the returne, and not in respect of the persons returned where there is no unindifferencie or default in the sherife, &c. for if the challenge to the array be found against the partie that takes it, yet he shall have his particular challenge to the polls (1).

In some cases a challenge may be had to the polls, and in some cases not at all. Challenge to the polls is a challenge to the particular persons; and these be of foure kinds, that is to say, peremptorie, principall, which induce favour, and for default of hundredors.

[p] Peremptorie. This is so called, because he may challenge peremptorily upon his owne dislike, without shewing of any cause; and this onely is in case of treason or felonie, *in favorem vite*. And by the common law the prisoner, upon an enditement or appeale, might challenge thirtie five, which was under the number of three juries. But now by the statute of 22. H. 8. the number is reduced to twentie in petite treason, murder and felonie; and in case of high treason, and misprision of high treason, it was taken away

[p] 1. H. 5.
Chal. 162.
9. H. 5. 7.
15. E. 4. 32.
14. H. 7. 7. 19.
Doct. & Stud.
lib. 2.
Fortescue cap.
27. 3. H. 7. 2.
2. R. 3. 13.
32. H. 6. 26.

(3) [See Note 279.]

(4) [See Note 280.]

(5) [See Note 281.]

[156. b.]

(1) [See Note 281*.]

away by the statute of 33. H. 8. but now by the statute of 1. & 2. Phil. & Marie, the common law is revived. For any treason, the prisoner shall have his challenge to the number of thirtie (2) five; and so it hath beene resolved * by the justices upon conference betweene them in the case of sir Walter Raleigh and George Brookes. But all this is to be understood when any subject that is not a peere of the realme, is arraigned for treason or felonie. But if hee be a lord of parliament and a peere of the realme, and is to be tryed by his peeres, he shall not challenge any of his peeres at all; for they are not sworne as other jurors be, but finde the party guiltie or not guiltie upon their faith or allegiance to the king, and they are judges of the fact, and every of them doth separately give his judgement, beginning at the lowest. But a subject under the degree of nobilitie may in case of treason or felonie challenge for just cause as many as he can, as shall be said hereafter. In an appeale of death against divers, they pleade not guiltie, and one joynt *venire facias* is awarded; if one challenge peremptorily, he shall be drawne against all. (3) Otherwise it is of severall *venire fac.*

Note, that at the common-law before the statute of 33. E. 1. the king might have challenged peremptorily without shewing cause, but only that they were not good for the king, and without being limited to any number. But this was mischievous to the subject, tending to infinite delayes and danger. And therefore it is enacted, [q] *quod de cætero licet pro domino rege dicatur, quod juratores, &c. non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumnie suæ, &c.* whereby the king is now restrained. (4)

Principall; so called, because if it be found true, it standeth sufficient of itselfe without leaving any thing to the conscience or discretion of the triors. Of a principall cause of challenge to the array, we have said somewhat already. Now it followeth with like brevitie to speake of principall challenges to the polles, (that is) severally to the persons returned.

Principall challenges to the poll may be reduced to foure heads: first, *propter honoris respectum*, for respect of honour: secondly, *propter defectum*, for want or default: thirdly, *propter affectum*, for affection or partialtie: fourthly, *propter delictum*, for crime or delict.

I. *Propter honoris respectum*, as any peere of the realme, or lord of parliament, as a baron, viscount, earle, marquesse, and duke: for these in respect of honour and nobilitie, are not to be sworne on juries; and if neither partie will challenge him, he may challenge himselfe; for by *Magna Charta* it is provided, *quod nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ.* Now the common law hath divided all the subjects into lords of parliament, and into the commons of the realme. The peers of the realme are divided into barons, viscounts, earles, marquesses, and dukes. The commons are divided into knights, esquires, gentlemen, citizens, yeomen, and burgeses. And in judgement of law any of the said degrees of nobilitie are peers to another. As if an earle, marquesse, or duke, be to be tried for treason or felonie, a baron or any other degree of nobilitie is his peere. In like manner, a knight, esquire, &c. shall be tried

17. Aff. 6.
37. H. 6. 8.
22. H. 8. ca. 14.
33. H. 8. tit.
Chal. Br. 217.
33. H. 8. ca. 23.
1. & 2. P. & M.
ca. 10.
23. H. 6. 26.
14. H. 7. 14.
Stanf. Pl. Cor.
137, 138.
(2. Inst. 227.)
* Hill. 1. Ja. R.
9. E. 4. 27.

[q] 33. E. 1.
ordinatio de in-
quisitionibus.
Stanf. Pl. Cor.
162.

6. Co. 52, 53.
Countesse de
Rutland's case.
43. E. 3. 30.
48. Aff. 6.
35. H. 6. 46.
22. Aff. 24.
F. N. B. 165.
D. E. & 166.
Regist. 179.
(1. Sid. 277.)

per

(1) Agree! acc. in petty treason. in
Swan's case, Roll. 107.

(3) Adj. acc. Plowd. 100.

(4) [See Note 282.]

per pares; and that is by any of the commons, as gentlemen, citizens, yeomen, or burghesses; so as when any of the commons is to have a tryall either at the king's suit, or betweene partie and partie, a peere of the realme shall not be impannelled in any case.

II. *Propter defectum.*

[a] 7. Co. 18.

Calvin's case.

10. Co. 104.

14. H. 4. 19. b.

[b] Bract. fo.

185. Brit. fo.

135. Flet. li. 4.

ca. 8. 26. Aff. 28.

3. H. 6. 39.

9. E. 4. 16. b.

21. H. 6. 20.

10. H. 7. 20.

[c] Vid. Sect.

464. 38. Aff. 19.

17. Aff. 15.

4. H. 6. 28.

9. H. 5. 5.

10. H. 6. 7, 8. 18.

2. H. 7. 1.

10. H. 7. 14.

19. H. 6. 9.

7. H. 6. 25. 40.

44. 12. E. 4. 13.

3. H. 4. 4.

9. H. 7. 1.

[e] 12. H. 7. 4.

Post. 158. a.)

1. *Patricæ*, [a] as aliens borne.

2. *Libertatis*, [b] as villeins or bondmen, and so a champion must be a freeman.

3. *Annui census, i. e. liberi tenementi*. [c] First, what yearely freehold a juror ought to have that passeth upon triall of the life of a man, or in a plea reall, or in a plea personall, where the debt or dammage in the declaration amounteth to fortie markes, *Vide* Sect. 464. (5) * Secondly, this freehold must be in his owne right, in fee simple, fee taile, for terme of his owne life, or for another man's life, although it be upon condition, or in the right of his wife, out of antient demesne, for freehold within ancient demesne will not serve. But if the debt or dammage amounteth not to fortie marks, any freehold sufficeth. [d] Thirdly, he must have freehold in that countie where the cause of the action ariseth; and though he hath in another, it sufficeth not (1). [e] Fourthly, if after his returne he selleth away his land, or if *cestuy que vie* or his wife dieth, or an entry be made for the condition broken, so as his freehold be determined, he may be challenged for insufficiencie of freehold (2).

[157. a.]

(See the statutes of 23. H. 8. 13. and 4. & 5. W. & M. 24.) * 9. H. 6. Chal. 27.

(2. Ro. Abr. 647. Post. 272. Fortesc. 56. 62. a.) [d] 19. H. 6. 9. 17. Aff. 15.

[e] 12. H. 7. 4. 21. H. 6. 38. 7. H. 4. 1. (Post. 272. b.) (2. Ro. Abr. 636. Fortesc. 56. b.

4. *Hundredorum*. First, by the common law, in a plea reall mixt and personal, there ought to be foure of the hundred (where the cause of action ariseth) returned for their better notice of the cause; for *vicini vicinorum facta præsumuntur scire* (3). And now since *Littleton* wrote [f] in a plea personall, if two hundredors appeare, it sufficeth (4); and in an attaint, [g] although the jury is double, yet the hundredors are not double. Secondly, [b] if he hath either freehold in the hundred, though it be to the value but of halfe an acre, or if he dwell there, though hee hath no freehold in it, it sufficeth. [i] Thirdly, if the cause of the action riseth in divers hundreds, yet the number shal suffice, as if it had come out of one, and not severall hundredors out of each hundred. [k] Fourthly, if there be divers hundreds within one leet or rape, if he hath any freehold, or dwell in any of those hundreds though not in the proper hundred, it sufficeth. [l] Fifthly, if the jury come *de corpore comitatûs*, or *de proximo hundredo*, where the one partie is lord of the hundred, or the like, there need no hundredors be returned at all. [m] Sixtly, if a hundredor after he be returned sell away his land within that hundred, yet shall he not be challenged for the hundred, for that this notice remaines. Otherwise

[f] 27. Eliz.

ca. 6.

[g] 7. H. 4. 47.

[b] 16. E. 4. 7.

4. Mar. Br.

Chal. 216.

21. E. 4. 74. 75.

9. H. 6. 66.

[i] 20. H. 6. 23.

4. Mar. Br.

Chal. 216.

[k] 10. H. 6. 5.

12. H. 4. 14.

19. E. 4. 5.

[l] 37. H. 6. 11.

25. E. 3. 43.

(Cro. Jam. 550.)

[m] 21. H. 6. 38.

12. H. 7. 4.

[157. a.]

(5) See also a learned dissertation on the writ *de non ponendis in assis et juratis* in the Miscellany of Law-Tracts by the late mr. serjeant Wynne, p. 62. to 74. See too 1. Vent. 366. and sir John Hawles's Remarks on Trials. in State Trials, 4th ed. v. 3. p. 169. 187.

(1) *Vid. acc. per omnes justiciarios* M. 29.

30. Eliz. Clench 139.—Hal. MSS.

(2) See ant. 102. b.

(3) See Brownl. Rep. b. 194.

(4) [See Note 283.]

wife as hath bin said for his insufficiencie of freehold; for his feare to offend, and to have lands wasted, &c. which is one of the reasons of law, is taken away. [n] Seventhly, he that challengeth for the hundred must shew in what hundred it is, and not drive the other partie to shew it. Eightly, his challenge for the hundred is not *simpliciter* but *secundum quid*; for, though it bee found that he hath nothing in the hundred yet shall he not be drawne, but remaine *præter H.* that is, besides for the hundred; and albeit he dwelleth or have land in the hundred, yet must he have sufficient freehold.

III. *Propter affectum*: And this is of two sorts, either working a principall challenge, or to the favour. And againe a principall challenge is of two sorts, either by judgement of law without any act of his, or by judgement of law upon his owne act.

And it is said that a principall challenge is, when there is expresse favor or expresse malice.

1. Without any act of his, as if the juror bee [a] of blood or kindred to either partie, *consanguineus*, which is compounded *ex con & sanguine, quasi eodem sanguine natus*, at it were issued from the same blood; and this is a principall challenge, for that the law presumeth that one kinsman doth favour another before a stranger; [b] and how farre remote so ever he is of kindred, yet the challenge is good. And if the plaintife challenge a juror for kindred to the defendant, it is no counter plea to say that he is of kindred also to the plaintife, though hee bee in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[c] If a body politick or incorporate, sole or aggregate of many, bring any action that concernes their body politick or incorporate, if the juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred) yet for that those bodies consist of naturall persons, it is a principall challenge. [d] A bastard cannot be of kindred to any, (5) and therefore it can be no principall challenge. And here it is to be knowne, that *affinitas*, affinity, hath in law two senses. In his proper sense it is taken for that neernesse that is gotten by marriage. *Cum duæ cognationes inter se divisæ per nuptios copulantur, & altera ad alterius fines accedit, & inde dicitur affinis.* In a larger sense *affinitas* is taken also for consanguinitie and kindred, as in the writ of *venire facias*, and otherwhere. [e] Affinity or alliance by marriage is a principall challenge, and equivalent to consanguinity when it is betweene either of the parties, as if the plaintife or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintife or defendant, and the same continues, or issue be (6) had. But if the son of the juror hath married the daughter of the plaintife, this is no principall challenge, but to the favour; because it is not betweene the parties. Much more may be said hereof; *sed summa sequor fastidia rerum.*

[f] If there be a challenge for cosinage, he that taketh the challenge must shew how the juror is cousin. But yet if the cosinage, that is the effect and substance, be found, it sufficeth; for the

(5) See ant. 123. a.

(6) But the issue must be *living*. See ant. 156. a. n.

[n] 7. Eliz.
Dyer 231.

Bract. fo. 185.
Brit. fo. 134, 135.
Fleta lib. 4. c. 8.
21. E. 4. 11, 12.

[a] Britton fol.
135.

[b] Mirror ca. 3.
de ordinance
d'attaint.
Bracton } ubi
Britton } supra.
Fleta }
14. El. Dier 319.
21. E. 4. 75.
40. Pl.
Com. fo. 41. E. 3.
Chal. 99.

[c] 7. E. 4. 4.
17. E. 4. 7.
21. E. 4. 25.
28. H. 6. 15.
28. Aff. 13.
34. Aff. 6.
Hob. 87.

1. Saund. 344.
[d] 41. E. 3.
Chal. 99. 41. E. 3.
9. 26. H. 6.
Chal. 163.

[e] Mirror
Bracton } ubi
Britton } supra.
Fleta }
3. E. 4. 14.
21. E. 3. 5.
41. 43. E. 3.
Chal. 93.
43. Aff. 25. 26.
22. E. 4. 2.
14. H. 7. 2.
15. 11. 7. 9.

[f] 9. H. 8. 7.
28. H. 8. Dier
27. 1. Mariz
Dyer 91. 2. Eliz
ibid. 177.

the law preferreth that which is materiall before that which is formall.

[g] Brac. } ubi
Britton } supra
Fleta }

Mirror ubi supra.

[b] 9. H. 6.

tit. Chal. 27.

38. E. 3. 25.

22. E. 4. Chal. 61.

4. H. 6. 25.

3. H. 6. 39.

36. H. 6. Chal.

46. 22. E. 4. 1.

27. Aff. 28.

22. E. 3. 12.

[i] 23. Aff. 11.

[k] Mirror ubi

supra.

[l] 8 H. 5. 10.

33. H. 6. 1.

10. H. 6. 24.

7. H. 4. 11.

18. E. 4. 12.

21. E. 4. 74.

11. R. 2. tit.

Challenge. 66.

27. Aff. 13.

[m] 43. E. 3.

Chal. 93.

8. H. 5. 10.

[n] Mirror ubi

supra. Brit. fo.

12. 11. Aff. 36.

8. H. 4. 2.

7. E. 4. 4.

12. Aff. 26.

19. Aff. 6.

40. Aff. 10.

25. E. 3. c. 3.

[o] 40. Aff. 20.

2. H. 4. 15.

10. H. 6.

Chal. 40.

7. H. 6. 40.

19. H. 6. 66.

4. E. 4. 11.

7. E. 4. 4.

7. H. 7. 10.

[g] If the juror have part of the land that dependeth upon the same title. (7)

[b] If a juror be within the hundred, (8) leet, or any way within the seignory immediately or mediately, or any other distresse of either party, this is a principall challenge. But if either party be within the distresse of the juror, this is no principall challenge, but to the favour.

[i] If a witnesse named in the decd (9) be returned of the jury, it is a good cause of challenge of him. [k] So it is if one within age of one and twenty bee returned, it is a good cause of challenge.

2. [l] Upon his own act, as if the juror hath given a verdict before for the same cause, albeit it be reversed by writ of error, or if after verdict, judgement were arrested. So if hee hath given a former verdict upon the same title or matter though betweene other persons. [m] But it is to be observed, that I may speake once for all, that in this or other like cases, hee that taketh the challenge must shew the record if he will have it take place as a principall challenge: otherwise he must conclude to the favour (1), unlesse it be a record of the same court, and then he must shew the day and terme.

[n] So likewise one may be challenged, that he was inditor of the plaintife or defendant, either of treason, felony, misprision, trespassse, or the like in the same cause.

[o] If the juror be godfather to the child of the plaintife or defendant, or *à converso*, this is allowed to be a good challenge in our bookes (2).

[p] If a juror hath beene an arbitrator chosen by the plaintife or defendant in the same cause, and have beene informed of, or treated of the matter, this is a principall challenge. Otherwise if he were never informed, nor treated thereof; and otherwise if hee were indifferently chosen by either of the parties, though he treated thereof. But a [q] commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge; for he is made by the king under the great seale, (3) and not by the partie, as the arbitrator is; but he may upon cause be challenged for favour.

[p] 20. H. 6. 39. 9. E. 4. 46. 35. H. 6. 19. H. 6. 3 H. 6. 24.
(2. Ro. Abr. 665.) [q] 9. Co. 71. Peacock's case.

[r] Mir. } ubi
Bracton } supra
Britton }

12. Aff. 36.

26. Aff. 56.

28. Aff. 19.

31. Aff. 7.

44. Aff. 18.

[r] If hee be of counsell, servant, or of robes, or fee of either partie, it is a principall challenge. (4)

[s] If any after he be returned do eate and drinke at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

[s] 13. H. 4. 13. 11. R. 2. Chal. 164.

Actions

(7) Here the sense is incompleat; but I apprehend, that lord Coke means to give the exception as a principall challenge.

(8) Acc. Dy. 176. a.

(9) See ant. 6. a.

[157. b.]

(1) Acc. 2. Brownl. 268.

(2) See Mo. 3.

(3) See an instance of such a commission in Cro. Jam. 65.

(4) See ant. 156. a. n. 4.

(5) The same thing avoids a verdict. Post. 227. b.

[t] Actions brought, either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principall challenge; unlesse they be brought by covyn either before or after the returne; for if covin be found, then it is no cause of challenge. Other actions, which doe not imply malice or displeasure, are but to the favour.

[u] In a cause, where the parson of a parish is partie, and the right of the church commeth in debate, a parishioner is a principall challenge. Otherwise it is in debt, or any other action where the right of the church commeth not in question.

[w] If either party labour the juror, and give him any thing to give his verdict, this is a principall challenge. But if either partie labour the juror to appeare and to doe his conscience, this is no challenge at all, but lawfull for him to do it. (6)

[u] 17. Aff. 15.
Hob. 294.)

[w] 8. E. 3. 39. 20. H. 6. 39. 33. H. 8. Dyer 48.

[x] That the juror is a fellow servant with either partie is no principall challenge, but to the favour.

[y] Neither of the parties can take that challenge to the polls, which he might have had to the array.

[a] Note, if the defendant may have a principall cause of challenge to the array, if the sherife returne the jury, the plaintife in that case may for his owne expedition alledge the same, and pray proesse to the coroners; which he cannot have, unlesse the defendant will confesse it; but if the defendant will not confesse it, then the plaintife shall have a *venire facias* to the sherife, and the defendant shall never take any challenge for that cause (7), and so in like cases. But on the part of the defendant any such matter shall not bee alledged, and proesse prayed to the coroners; because he may challenge the jury for that cause, and can be at no prejudice.

[b] Challenge concluding to the favour, when either partie cannot take any principall challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triors upon hearing their evidence to find him favourable or not favourable. But yet some of them come neerer to a principall challenge then other. [c] As if the juror be of kindred, or under the distresse of him in the reversion or remainder, or in whose right the avowrie or justification is made, or the like, these be no principall challenges; because he in reversion, remainder, or in whose right the avowrie or justification is, is not partie to the recorde; otherwise it is if they were made parties by aide, receipt, or voucher: and yet the cause of favour is apparent; so it is of all principall causes, if they were partie to the record. Now the causes of favour are infinite; and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the reader to the reading of our bookes concerning that matter. For all which the rule of law is, that he must stand indifferent as hee stands unsworne.

[d] The subject may challenge the polles, where the king is partie. And if a man bee outlawed of treason or felony, at the suit of the king, and the party for avoyding thereof alledgeth imprisonment, or the like, at the time of the outlawry; though the issue bee joyned upon a collaterall point, yet shall the partie have such challenges

[t] Brac. } ubi
Fleta } supra
44. E. 3. 5. 38.
44. Aff. 23.
8. E. 3. 25.
43. E. 3. 31.
22. E. 4. 1.
38. H. 6. 6.
43. E. 3.
Chal. 93.
11. H. 4. 26.
11. H. 6. 15.
32. E. 3. Chal.
189. 24. E. 3. 37.
39. Aff. 2.
20. Aff. 11.
43. Aff. 46.
(Post. 379; a.)

[x] 22. Eliz.
Dyer 367.
Bracton } ubi
Britton } supra
Fleta }
[y] 49. E. 3. 1.
[a] 9. E. 4. 6.
21. E. 4. 31.
22. E. 4. 3.
14. H. 6. 2.
20. E. 4. 2.
3. H. 7. 5.
22. Eliz. Dyer
367.
(2. Ro. Abr.
644. 668, 669.
Cro. Jam. 547.
Post. 320. b.
Plowd. 74. a.
Hob. 64.)
[b] Mirror ca. 3.
d'ordinanced' at
taint. Bract. lib.
4. fol. 185.
Britt. fol. 134.
135. Fletalib. 4.
e. 8.
7. H. 6. 25.
[c] 9. H. 7. 3.
10. H. 7. 20.
3. H. 7. 2.
10. E. 4. 12.
15. E. 4. 18.
12. Aff. 23.
(1. Ro. Rep. 528.
Cro. Jam. 547.)
[d] 6. R. 2.
Chal. 141.
19. Aff. 6.
38. Aff. 22.
11. R. 2.
Chal. 165.
4. H. 5. 16d.
153.
(1. Sid. 244.)

(6) [See Note 284.]

(7) Held accordingly Hutt. 22.

challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

[e] Mirror
Bracon } ubi
Britton } supra
Fleta }
11. H. 4. 41.
12. H. 4. 10.
13. H. 6. 21.
(2. Ro. Abr.
650.)

IV. *Propter delictum*. [e] As if the juror be attainted or convicted of treason, or felony, or for any offence to life or member, or in attain for a false verdict, or for perjury as a witnesse, or in a conspiracie at the suite of the king, or in any suite (either for the king, or for any subject) be adjudged to the pillory, tumbrell, or the like, or to be branded, or to be stigmatique, or to have any other corporall punishment whereby he becommeth infamous, (for it is a maxime in law, *repellitur à sacramento infamis*) these and the like are principall causes of challenge. So it is if a man be outlawed in trespassse, debt, or any other action, (1) for he is *exlex*, and therefore is not *legalis homo*. And old bookes have said, that, if he be excommunicated, he could not be of a jury.

[f] W. 2. ca. 38.
Artic. super
cart. ca. 9.
F. N. B. 165,
& 166. Registr.

[f] See the statutes of W. 2. and *Artic. supra Cartas*, what persons the sherife ought to returne on juryes. And see *F. N. B. breve de non ponendis in assisis et juratis*, (2) and the register in the same writ. And see there what remedy the party hath that is returned against law.

[g] 9. E. 4. 16.
10. H. 5. 9.
37. H. 6. 8.
3. H. 6. 38.
Brooke tit.
Chal. 8.
7. H. 6. 40.
14. H. 7. 5, 6.
[h] 9. E. 4. 16.
27. H. 8. 2.
[i] 43. E. 3.
Chal. 93.
20. E. 3. ibid.
116. 22. E. 4.
ibid. 61.
7. H. 4. 41.
3. El. Dower 201.
[k] 22. E. 4. 1.
9. H. 5. 6.
[l] 1. H. 5. 10.
38. Aff. 22.
(Ant. 157. a.)
[m] 7. H. 4. 20.
15. E. 4. 1.
[n] 9. E. 4. 27.
9. H. 5. 11.
34. Aff. 6.
13. E. 3.
Chal. 108.

It is necessarie to be knowne the time when the challenge is to be taken. [g] First, hee that hath divers challenges must take them all at once, and the law so requireth indifferent trialls, as divers challenges are not accounted double. [h] Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. [i] Thirdly, after challenge to the array, and triall duely returned, if the same party take a challenge to the polls, hee must shew cause presently. [k] Fourthly, so if a juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworne. [l] Fifthly, when the king is party or in an appeale of felony, the defendant, that challengeth for cause, must shew his cause presently. Sixtly, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the hundred must bee taken before so many bee sworne as will serve for hundredors, or else hee loseth the advantage thereof. Eighthly, [m] in a writ of right, the ground jury must bee challenged before the foure knights before they be returned in court; (3) for after they be returned in court, there cannot any challenge be taken unto them. Ninthly, *nota*, [n] The array of the *tales* shall not bee challenged by any one party, untill the array of the principall be tried; but if the plaintife challenge the array of the principall, the defendant may challenge the array of the *tales*. After one hath taken a challenge to the polle, he cannot challenge the array.

Now it is to be seene, how challenges to the array of the principall pannel, or of the *tales*, or of the polles shall be tried, and who shall bee triors of the same, and to whom processe shall be awarded.

[o] 18. E. 4. 8.
(Fortesc. 55.)

1. [o] If the plaintife alledge a cause of challenge against the sherife, the processe shall be directed to the coroners; if any cause against

(8) [See Note 285.]

tation upon this writ in his Miscellany of Law Tracts, p. 56.

[158. a.]

(1) [See Note 286.]

(3) Acc. ant. 156. b. & post. 294. a.

(2) See the late mr. serj. W. nne's Dissor.

against any of the coroners, proceſſe ſhall be awarded to the reſt; if againſt all of them, then the court ſhall appoint certaine eliſors or eſſiors (ſo named *ab eligendo*) becauſe they are named by the court, againſt whoſe returne no challenge ſhall be taken to the array, becauſe they were appointed by the court; but hee may have his challenge to the (4) polles. [p] Note, if proceſſe be once awarded for the partiality of the ſherife, though there be a new ſherife, yet proceſſe ſhall never bee awarded to him; for the entrie is, *Ita quodd vicecomes ſe non intromittat*. But otherwiſe it is, for that he was tenant to either partie, or the like.

2. [q] If the array be challenged in court, it ſhall be tryed by two of them that be impannelled, to be appointed by the court; for the triors in that caſe ſhall not exceed the number of two, unleſſe it be by conſent. But when the court names two for ſome ſpeciall cauſe alledged by either partie, the court may name others. If the array be quaſhed, then proceſſe ſhall be awarded, *ut ſupra*.

[r] If a pannell upon a *venire facias* be returned, and a *tales*, and the array of the principall is challenged, the triors, which try and quaſh the array, ſhall not try the array of the *tales*; for now it is as if there had beene no appearance of the principall pannell: but if the triors affirme the array of the principall, then they ſhall try the array of the *tales*. If the plaintife challenge the array of the principall, and the defendant the array of the *tales*, there the one of the principall, and the other of the *tales*, ſhall try both arrayes. For other matter concerning the *tales*, ſee [s] in my Reports matters worthy of obſervation (5). [t] When any challenge is made to the polles, two triors ſhall bee appointed by the court; and if they trie one indifferent, and he be ſworne, then he and the two triors ſhall try another; and if another be tried indifferent, and he be ſworne, then the two triors ceaſe, and the two that be ſworne on the jury ſhall try the reſt. [u] If the plaintife challenge ten, and the defendant one, and the twelfth is ſworne, becauſe one cannot try alone, there ſhall be added to him one challenged by the plaintife, and the other by the defendant. When the triall is to be had by two counties, the manner of the triall is worthy of obſervation, and apparant in our [w] books. [x] If the foure knights in the writ of right be challenged they ſhall try themſelves (6), and they ſhall chooſe the ground aſſiſe, and try the challenges of the parties. [y] If the cauſe of challenge touch the diſhonor or diſcredit of the juror, he ſhall not be examined upon his oath, (1) but in other caſes he ſhall be examined upon his oath, to informe the triors. (2) [z] If an inqueſt bee awarded by default, the defendant hath loſt his challenge; but the plaintife may challenge for juſt cauſe, and that ſhall be examined and tried.

Whereſoever the plaintife is to recover *per viſum juratorum*, there ought to be fixe of the jury that have had the view or knowne the land in queſtion, ſo as he be able to put the plaintife in poſſeſſion if he recover.

In a *proprietary probandā*, and a writ to inquire for waſte, the parties have beene received to take their challenges. (3) [a] But

(4) See further on awarding *venires* to coroners and on appointing *eliſors*, Undiev. Lex Coronator. 235. to 242.

(5) See alſo Trials per Pais, chap. 5.

(6) Acc. poſt. 294. a.

[158. b.]

(1) Held accordingly by the Court in Cook's caſe Salk. 153.

(2) See Note 287.]

(3) [See Note 288.]

G g 3

[p] 15. H. 7. 9.
14. H. 7. 31.
18. E. 4. 3.

[q] 29. Aff. 3.
19. H. 6. 48.
21. H. 6.
Chal. 38.
33. H. 6. 21.
4. E. 4. 17.
43. E. 3.
Chal. 95.

2. R. 2. ibid.
101. 34. Aff. 6.
27. Aff. 28.
43. Aff. 26.
[r] 9. E. 4. 46.
19. H. 6. 48.
34. Aff. 6.
7. E. 6. Dier 78.
9. H. 5. 11.
[s] 10. Co. 104,
105. Denbawd's
caſe.

[t] 19. H. 6. 9.
22. E. 4.
Chal. 61, 62.

[u] 7. H. 4. 41.

[w] 11. H. 4. 61.
48. E. 3. 30.
11. H. 4. 63.
[x] 22. E. 3. 18.
39. E. 3. 2.
[y] 49. E. 3. 1, 2.
(Hob. 84. 1. Sid.
374. 232. C10.
Jam. 388.
1. Ro. Rep. 110.)

[z] 2. H. 4. 14.
4. E. 4. 3.
10. E. 3. 32.
22. Aff. 28. 31.
21. H. 6. 56.
16. Aff. 1.
5. E. 5. 35, 36.

[a] 8. H. 5. tit.
Chal. 167.
2. H. 4. 3.

34. E. 3. Chal.
175.
21. H. 6. 56.
8. E. 4. 3.
16. E. 4. 1.
* Bracton lib. 4.
fo. 185.
(7. Co. 1.
Bulwer's case.)

passing over many things touching this matter, I will conclude with the saying of * Bracton. *Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt sufficiant exempli causâ.* (4) And so let us return to Littleton.

"*De visneto, &c.*" It should be *vicineto*. *Vicinetum* is derived of this word *vicinus*, and signifieth neighbourhood, or a place neere at hand, or a neighbour place. And the reason wherefore the jury must be of the neighbourhood, is, for that *vicinus facta vicini præsumitur scire*; all which is implied in this word (*&c.*)

"*Quod summeat eos, &c.* *Summeo* is compounded of *sub* & *meo*, & *euphoniæ gratiâ* it is said *summeo*, to warne or summon, as in this case the sherife must warne or summon the recognitors of the assise to appeare before the justices of assise, &c. And it is truly said [b], that in this case *legitimam summonitionem recipere in propriâ personâ ubicunque inventus fuerit in comitatu in quo fuerit res petita; qui quidem si non inveniatur, sufficit si ad domicilium fiat, dum tamen alicui de familiâ suâ manifeste fuerit relata, &c.*

[b] Bracton lib.
5. fo. 333, 334.
Mirr. cap. 2.
sect. 19. Fleta
lib. 6. cap. 6.
Brit. cap. 121.

"*Per bonos summonitores.*" Here two things are to be observed, 1. That the summoners must be *boni (id est) fide digni, ut valeant legitimum testimonium perhibere, cum inde per justiciarios fuerint requisiti.* [c] And another saith, *fems, ne sirs, ne enfans, ne nul enfamys, ne nul que nest fise tenant, ne poet est bone summoner.* 2. It is spoken in the plurall number, *per bonos summonitores*, and therefore there must be two at the least. *Nec sufficit quod summonitio fiat per unum tantum, &c. necesse est igitur quod per duos ad minus fiat, &c.* There is also a summons of a tenant in a reall action; whereof, and of perrors and veiors you shall reade [d] plentifully and plainly in our bookes, whereunto being matter of course I referre you.

[c] Brac. } ubi
Button } supra
Fleta }
Bracton }
Britton } ubi
Fleta } supra
Mirror }
[d] Regist. judi-
cial. 1. 2. 107.
43. E. 3. 32.
24. E. 3. 35.
3. E. 3. 48.
50. E. 3. 16.
8. H. 6. 1. b.
F. N. B. 97.
[e] Mirror

Item summonitionum alia est generalis, alia specialis. Whereof you shall finde excellent matter in our [e] old bookes, where you shall also reade at large *de summonitione, præsummonitione, & resummonitione.*

[e] Mirror
Bracton } ubi
Britton } supra
Fleta }

"*Facere recognitionem.*" *Cognitio* is knowledge, or knowledge-ment, or opinion, and recognition is a serious acknowledgement or opinion upon such matters of fact as they shall have in charge, and thereupon the jurors are called *recognitores assise*. *Vide* Sect. 233. *recognitio* taken for the confession of the tenant.

"*Pannell*" is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part; as a pannell of wainscot, a pannell of a saddle, and a pannell of parchment wherein the jurors names be written and annexed to the writ. And a jury is said to be impannelled, when the sherife hath entred their names into the pannell, or little peece of parchment, *in pannello assise*.

Register 223;

"*Briefe de droit,*" *Breve de recto.* Writs of right be of two natures: 1. A writ of right, whereof Littleton here speaketh, which is the highest writ of all other reall writs whatsoever, and hath the greatest respect, &c. and the most assured and finall judgement; and

and therefore this writ is called a writ of right; and this in [f] old books is called *dreit dreit*; and this writ *est darrein remede de tous recoveries enter tous ordres des plaas*; and the jury in this writ is called *magna assisa*, or *magna jurata*, as Littleton here saith. 2. Writs of right in their nature, as the *rationabili parte*, and *in iussu vana*.

“*De rectis.*” *Rectum* is a proper and significant word for the right that any hath and wrong or injury is in French aptly called *tort*; because injury and wrong is wrested or crooked, being contrary to that which is right and straight. Now the law that is *lex recta est index sui et obliqui*. And Britton * saith, that *tort a la ley est contrarye*, and as aptly for the cause aforesaid is injury in English called wrong. And *injuria* is derived of *in* and *jur*, because it is contrary to right; so as a faire tort is *facere tortum*. And Fleta saith, [g] *est autem ius publicum et privatum, quod ex naturalibus præceptis, aut gentium, aut civilibus est collectum; et quod in iure scripto ius appellatur, id in lege Angliæ rectum esse dicitur*. And in the [b] Mirror, and other places of the law, it is called *droit*; as *droit defend*, the law defendeth.

159. a.] “*Ex le Register.*” Register is a most ancient booke of the common law; and it is two-fold, viz. *registrum brevium originalium*, and *registrum brevium judicialium*. It is a French word, and signifieth a memoriall of writs. Sometimes the register of original writs is called *registrum cancellariæ*; because all original writs doe issue out of the chancery, as *extra officium iustitiæ*; for the antiquity and estimation of which booke I referre the reader to the epistle before the Tenth Part of my Commentaries. (1)

“*Magna assisa eligenda*” is a judiciall writ to the sherife to returne foure lawfull knights before the justices, there upon their oathes to returne twelve (2) knights of the vicinage to try the mise in a writ of right.

“*Assise de common de pasture, &c.*” Of what things an *assise* of *novel disseisin* lay at the common law, and of what by the statute, you may reade at large in my [k] Reports in *John Webbe's* case, where the authorities of law are plentifully cited, and they and the statute well explained. But since Littleton wrote, a man may have [l] an assise of *novel disseisin*, *assise* of *mord'anc'* or any *præcipe quod reddat*, *quod ei deforceat*, writs of dower, or other writs originall, as the case shall require, of tythes, pensions, or other ecclesiasticall or spirituall profit, if he be disseised, deforced, wronged, or otherwise kept or put from the same, which by the lawes and statutes of the realme are made temporall, or admitted to be or abide in temporall hands; so as by the said act a lay man, having tythes or offerings, may either sue for the subtraction or with-holding of the same in the ecclesiasticall court, or at the common law, at his election. And seeing no speciall writ is given * by the statute, the party must have a generall writ of *assise de libero tenemento*, and make a speciall pleint. But his *præcipe* must be, *quod reddat annos et omnimodas decimas majores, mixtas, et minutas, infra Dale quoquo modo crejien' contragen' ac annualim*

[f] Bracton lib. c. fo. 372.
Britton fo. 117.
Fleta l. 6. ca. 1.
Glauil lib. 1.
c. 4, 5, &c. lib. 2.
c. 7. lib. 12. ca. 1.
(2. Ro. Ab. 686.)

(Post. 265. 2.
345. 2.)

* Britton fo. 116.
Fleta lib. 2.
ca. 1.

[g] Fleta lib. 6.
ca. 1.

[h] Mirror ca. 2.
lib. 16. & cap.
5. lib. 2.

12. E. 1. ca. 24.
Pl. Com. 28. b.

(Cro. Cha. 511.)

[i] 8. Co. 45.

[j] 32. H. 8.
ca. 7.

* 7 E. 6. Dic
83, &c.

(1) See also ant. 16. b. and 73. b.

(2) [See Note 289.]

[m] 44. E. 3. 5.
 Vid. Regist. 165.
 Vid. le briefe de
 indicavit. W. 2.
 ca. 5. Conjun-
 tum feoffatis ca.
 ultimo. Bracton
 lib. 5. fo. 402.
 Britton fo. 200.
 Reg. ft. fo. 35.
 4. E. 3. 27. 29.
 16. E. 3. quare
 imp. 147.
 Vid. 2. H. 3. tit.
 Grant 89.
 (Cro. Cha. 301.)
 [n] 27. H. 8. of
 Monasteries not
 printed.

31. H. 8. ca. 13.
 37. H. 8. ca. 4.
 1. E. 6. ca. 14.
 1. & 2. Ph. &
 Mar. ca. 8.
 2. E. 3. ca. 13.
 [o] 2. E. 6. ca. 13.

[p] Pasch. 29.
 Eliz. between
 the queene and
 Wood in the ex-
 chequer, and so
 it was resolved
 by all the judges
 upon conference,
 Mich. 4. Ja.
 regis.

[q] Britton fo.
 178, 179, &c.
 Bracton lib. 4.
 traſat. 3. per
 totum, fo 252,
 &c. Mirror ca.
 2. ſect. 15.
 F. N. B. 114. &c.
 [r] Britton ca.
 90. fo. 222.
 Bract. lib. 4.
 fo 238. Mirror
 ubi ſupra.
 F. N. B. 195.
 Regist. orig. 30.
 [s] Bracton fo.
 285, 286. Brit-
 ton ca. 95. fo.
 234. Mirror
 ubi ſupra.
 F. N. B. 48, 49.

annuatim renovan’, or the like, according to his caſe. [m] But neither aſſiſe nor any *præcipe* did lye of them as of tythes or any other eccleſiaſtical duty at the common law; for the aſſiſe brought of the tenth part of all manner of corne growing in an hundred acres of land, after the tythes of the parſon taken, was a lay profit *appren-der*, and no eccleſiaſtical duty.

But tythes or other eccleſiaſtical duties, that came to the crowne by the ſtatutes [n] of 27. H. 8. 31. H. 8. 37. H. 8. and 1. E. 6. are by thoſe ſtatutes and this of 32. H. 8. and of 1. and 2. Ph. & Mariæ in the hands of laymen temporall inheritances, and ſhall be accounted aſſets; and huſbands ſhall be tenants by the curteſie, and wives endowed of them, and ſhall have other incidents belonging to temporall inheritances. Onely this eccleſiaſtical quality they have that the owner or poſſeſſor thereof may ſue for the ſubtraction of the ſame in the eccleſiaſtical court.

But by another [o] ſtatute, remedy is given aſwell to the lay perſon as to the eccleſiaſtical perſon, for ſubtraction of all manner of prediall tythes; and he ſhall recover the treble value if they be not juſtly divided or ſet forth; and albeit the treble value be not expreſſy given to the proprietary of the tythes, yet forasmuch as he is the party grieved, and he hath the propertie and intereſt in the tythes, the treble value is given to him; and whenſoever a ſtatute giveth a forfeiture or penaltie againſt him which wrongfully detaineth or diſpoſſeſſeth another of his duty or intereſt, in that caſe he that hath the wrong ſhall have the forfeiture or penalty, and ſhall have an aſſion therefore upon the ſtatute at the common law, and the king ſhall not have the forfeiture in that caſe. And ſo it was [p] adjudged in the exchequer upon conference with other judges in an information for the treble value for not ſetting out of tythes in *Iclington* in the county of *Cambridge*. (3) And if the proprietary will ſue for ſuch ſubtraction of tythes in the eccleſiaſtical court, then he ſhall recover but the double value by the expreſſe words of the act. Wherein it is to be obſerved, that the act of parliament doth give a temporall remedy at the common law to parſons and vicars and other eccleſiaſtical perſons for an eccleſiaſtical duty, and to laymen proprietaries of tythes the like remedy; but, as it hath beene ſaid, they have election either to ſue for the treble value at the common law, or for the double value in the eccleſiaſtical court, or for ſubtraction of tythes there alſo. (4).

“*Aſſiſe de mord’anceſter*,” *Aſſiſa mortis anteaſſoris*. [q] This writ a man may have after the deceaſe of his immediate aſſeſſor; as where his father, mother, brother, ſiſter, uncle or aunt, dye ſeiſed of any lands, and an eſtranger abate, &c.

“*Aſſiſe de darreine preſentment*,” *Aſſiſa ultima preſentationis*, whereof you ſhall reade [r] plentifully in our bookes.

To theſe may be added *aſſiſa utrum*, or *juris utrum*, [s] which is the higheſt writ a parſon, vicar, &c. can have for the recovering of the gleebe land, &c. in right of his church. But it may be demanded, wherefore theſe originall writs are called by the ſpeciall name of aſſiſes more than other originall writs; and here *Littleton* yeeldeth the reaſon, becauſe that by theſe writs it is commanded to the ſheriffe

(3) The ſame caſe is more fully ſtated by lord Coke in 2. Inſt. 650. being part of his

comment on the ſtatute of 2. Ed. 6.
 (4) [See Note 290.]

[159. b.]

sherife *quod summoneat* 12, which is as much to say, as to summon a jury. So as in these cases, there is a jury returned the first day, and they are to appeare as soone as the defendant. And because by these writs a jury is to be returned, the law calleth them assises, *ab effectu*; because an assise (which in this sense signifieth a jury) is to be returned. But beside the signification of the writ * of assise, whereof *Littleton* here speaketh, it signifieth the whole proceeding upon the writ.

* Mag. Chart.
ca. 12. and W.
2. ca. 25.

In other originall writs regularly no jury is to be returned before the appearance of the parties and an issue joyned between them; and therefore these other originalls are not called assises.

“*Pur un ordinance.*” Here *assisa* signifieth an ordinance, &c. Ordinance, *ordinatio*, is derived of the verbe *ordinare*, to ordaine or set in order. And note, an act [r] of parliament (as *Littleton* here proveth) is an ordinance; for it sets downe orders, which are to bee kept as lawes: and so is *ordinatio forestæ*, *ordinatio de inquisitionibus*, and *ordinatio contra servientes*, and other statutes many times called ordinances; and it is said almost in every act of parliament, ‘Be it therefore ordained, &c. by authority of this parliament,’ or the like. But *à converso*, every ordinance is not a statute, as that of 8. H. 6. cap. 29. (1) for every statute must be made by the king, with the assents of the lords and commons; and if it appeare by the act, that it was made by two of them onely, it is no statute. (2)

[r] 19. H. 3.
Juris utrum 16.
39. E. 3. 1. 7.
42. E. 3. 38.
29. E. 3. 7.
Regist. orig. 189.
33. E. 1. 5. R. 2.
ca. 2. Vid. 8. Co.
le Princes case.

The example put by *Littleton* is *assisa panis et cervisiæ*. [s] This ordinance was made at a parliament holden anno 51. H. 3. and the like ordinance was made, entituled *assisa cervisiæ*, which you may see in old *Magna Charta*, fol. 57. b. [t] And so *assisa de Clarendon*, which was in 10. H. 2. and *assisa forestæ* ordained in anno 34. E. 1. and such like. And aptly an ordinance of parliament antiquity hath called an assise, for that an act of parliament doth ordaine such a certaine order, as nothing can be done more or lesse by right. [u] And *Fleta* saith *et habet rex in potestate suâ ut leges et consuetudines et assisas in regno suo provisas et approbatas et juratas*, &c. where assises are taken for statutes, which are the effects of the sessions of parliament.

[s] Mir. ca. 1.
sect. 13. & ca. 4.
de Articles de
Eire. Bract. li.
3. fo. 136.
[t] Stanf. fo.
118. Mir. ca. 2.
sect. 15.
Hoveden 313.
Regist. orig. 279.
[u] Flet. li. 1.
ca. 17.

De ponderibus et mensuris, of weights and measures, is a most necessary learning to bee knowne, and daily in use, but it belongeth not to this treatise. In some other (if God so please) somewhat shall be said of them. (3)

Sect. 235.

ITEM, si soit seignior et tenant, et le seignior granta le rent de son tenant per son fait a un autre, s'avant a luy les services, et le tenant atturina, ceo est un rent secke, come est dit adavant.

Mes

ALSO, if there bee lord and tenant, and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant atturneth, that is a rent secke,

(1) [See Note 291.]

(2) [See Note 292.]

(3) Accordingly lord Coke discourses a

little on these subjects in two other works. See 2. Inst. 41. and 4. Inst. 273.

Mes si le rent a luy soit denie al prochain jour de payment, il ny ad ascun remedie; pur ceo qu'il n'avoit de ceo ascun possession. Mes si le tenant, quaut il atturna al grantee, ou apres, voile doner al grantee un denier, ou un maile, &c. en nosme de seisin de le rent, donques si apres a le procheine jour de payment le rent a luy soit denie, il avera assise de novel disseisin. Et issint est lou home granta per son fait un annual rent issuant hors de sa terre a un auter, &c. si le grantor adonques ou apres paya al grantee un denier, ou un maile, en nosme de seisin de le rent, donques, si apres al procheine jour de payment le rent soit denie, le grantee poet aver assise, ou auterment nemy, &c.

secke, as it is aforesaid. But if the rent be denied him at the next day of payment, hee hath no remedie; because that he had not thereof any possession. But if the tenant when he atturneth to the grauntee, or afterwards, will give a penie or a halfe-penie to the grantee in name of seisin of rent, then if after at the next day of payment the rent bee denied him, he shall have an assise of *novel disseisin*. And so it is if a man grant by his deed a yearly rent issuing out of his land to another, &c. if the grauntor then or after pay to the grauntee a penie, or an halfe-pennie, in the name of seisin of the rent, then, if after the next day of payment the rent be denied, the grauntee may have an assise, or else not, &c.

“*ET le tenant attorna.*” Here it appeareth, that an attornament (that is, an agreement to the grant) is no seising of the rent.

“*Il ne ad ascun remedie, &c.*” which is as much to say, as he hath not any remedy either at the common law, or in any court of equity, which is worthy of observation.

See more of this in the Chapter of Attornement, Sect. 565. (4. Co. 10. Post. 314. b. 315. a.)

“*Voile doner al grantee un denier, ou un maile, &c. en nosme de seisin de rent, &c.*” Here it is to be observed, that payment of any money in name of seisin of the rent, before any rent become due, is a good seisin of the rent to have an assise when it is due; and that, which is given in the name of seisin of the rent, worketh his effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent: but you shall read more hereof hereafter, Sect. 565. [160. a.]

“*Un denier, ou un maile, &c.*” Here by this (&c.) is implied, that so it is of the gift of a sheepe, or an ox, or a ring, or a paire of gloves, or a pound of pepper, or of any valuable thing.

(6. Co. 56. b. 4. Co. 9.)

“*Issint si home grant per son fait un annual rent issuant hors de son terre a un auter, &c.*” By this (&c.) is implied, that the grant and deliverie of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintaine an assise or any other reall action, but there must be an actuall seisin.

Sect. 236.

ITEM, de rent secke heme poet aver
assise de mortd'ancester, ou brieve de
ayel ou de cosinage, et tous auters man-
ners d'actions reals, come la case gift,
sicome il poet aver d'ascun autre rent.

AL S O, of rent secke a man may
 have an assise of *mortd'auncestor*,
 or a writ of *ayel* or *cosinage*, and all
 other manner of actions realls, as the
 case lyeth, as hee may have of any
 other rent.

“**B**R I E F F E de *ayel*,” Breve de *avo*. This writ lieth, where
 the grandfather or grandmother was seised of any land in fee
 the day that he died, and an estranger abate, the heire shall have
 this writ. [w] And if the great grandfather *besaiel*, *proavus*, or
 great grandmother, *besaieles*, *proavia*, be seised, as is aforesaid, and
 die, &c. the heire shall have a writ de *besaiel*, *proavo*, or *besaieles*,
proaviâ, &c.

Bract. li. 2. fo.
 67. Brit. c. 89.
 & c. 76. Flet.
 li. 5. c. 7, 8, &c.
 F. N. B. 221.
 [w] 6. E. 3. 34.
 7 E. 3. 46.
 Regist. 226.
 F. N. B. 221.
 a. b.

“*Brieve de cosinage*,” Breve de *consanguinitate*. [a] This writ
 lieth, where the great grandfather's father, *tritavus* (*id est*) *tertius*
avus, or *abavus* (*id est*) *avus avi*, was seised as is aforesaid, or
 where grandfather's or grandmother's mother, &c. *ut supr*. And so
 it is of the seisin of the brother of the grandfather's grandfather,
 &c. (1)

Britton ca. 76.
 [a] Bract. lib. 2.
 fo. 67. Brit.
 c. 89. & c. 76.
 Flet. l. 5. ca. 7, 8.
 F. N. B. 221.

“*Rent secke*.” And so it is of a rent charge to all respects.

“*Et tous auters manners d'actions reals*.” Hereupon some have
 gathered, that a man shall have a writ of right of a rent secke,
 or of a rent charge albeit they be against common right. But
 that, which hath beene said by Littleton of an assise of *mortdaun-*
cester, a writ of *ayel*, *cosinage*, and other actions realls, is to be un-
 derstood after seisin had by some of the anceitors of the deman-
 dant; for without an actuall seisin or seisin in deed, none of these are
 maintainable.

15. E. 2. Hors
 de son fee 27.
 3. E. 3. 35.
 4. E. 3. droit 31.
 F. N. B. 6.
 14. E. 4. 5.
 Diversity des
 Courts 117.
 33 E. 3.
 Judgm. 252.

Sect. 237.

ITEM, sont trois causes de disseisin
 de rent service, scil. rescous, replevin,
 et inclosure. Rescous est, quaut le
 seignior en la terre tenus de luy distreine
 pour son rent arere, si le distres de luy
 soit rescous, ou si le seignior vient sur la
 terre, et voile distreyner, et le tenant ou
 auter home ne luy voile suffer, &c. Re-
 plevin est quaut le seignior ad dis-
 treine,

AL S O, there be three causes of
 disseisin of rent service, that is to
 say, rescous, replevin, and enclosure.
 Rescous is, when the lord distraineth
 in the land holden of him for his rent
 behind, if the distresse be rescued from
 him, or if the lord come upon the
 land, and will distreine, and the te-
 nant or another man will not suffer
 him,

(1) See the table for the degrees of consanguinity placed before fol. 18.

treine, et replevin soit fait de le distresse per brieve ou per plaint. Enclosure est, se les terres ou les tenemens sont issint encloses (1), que le seignior ne poyt vener deins les terres ou tenemens pur distreyner. Et la cause, pur que tiels choses issint faits sont disseisins al seignior, est pur ceo, que per tiels choses le seignior est disturbe de le mean per que il dait avoir et vener a son rent, scil. de le distresse. (2)

him, &c. Replevin is, when the lord hath distrained, and replevin is made of the distress by writ or by plaint. Enclosure is, if the lands and tenements be so enclosed, that the lord may not come within the lands and tenements for to distrein. And the cause, why such things so done be disseisins made to the lord, is for this, that by such things, the lord is disturbed of the meane by which hee ought to have come to his rent, *scil.* of the distress.

[Cro. Jam. 485. 2. Ro. Abr. 277. 456, 457. Hob. 180. Dy. 241. Cro. Cha. 109. F. N. B. 101. c.)
18. E. 3. 3.
44. E. 3. 20. b.
20. H. 7. 1. a.
21. H. 7. 40. a.
F. N. B. 102. b.
6. H. 6. Dis-
seisin 9. 4. E. 2.
Aff. 43. 8. E. 1.
ibid. 416.
W. 2. ca. 6.
12. H. 7.
Kellway 20.
(Post. 323. a.)
[p] 6. R. 2.
Rescous 10.
40. E. 3. 33.
31. E. 3.
Rescous 17.
22. H. 6. 2. b.
6. E. 4. 11. b.
7. E. 4. 29.
5. E. 4. 8.
34. H. 6. 47.
F. N. B. 102. E.
2. H. 4. 21. 16.
4. E. 6.
Distresse Br. 24.
39. E. 3. 35.
39. H. 6. 7.
4. Co. 11.
Bevill's case.
8. H. 4. 1.
(Ant. 47. b.
9. Co. 23.)

“**RESCOUS,**” *Rescussus*, is here described by Littleton. It is an ancient French word comming from *rescourrer*, (*id est*) *recuperare*, that is, to take from, to rescue or recover. *Rescous* is a taking away and setting at liberty against law a distresse taken, or a person arrested by the proces or course of law. And all is one, as to the point of the disseisin, to rescue the distresse after it is taken, and before hand to resist and withstand the taking of it; but yet it is no rescous, until it be distreyned. And therefore you may make fixe disseisins of a rent service; *rescous* of a distresse, resistance to distreyne, replevin, (3) inclosure, counterpleading of the title, and vouching of a record and failing. If the tenant rescue the distresse, and after is disseised of the tenancie, yet the assise lieth against him for the disseisin done of the rent by the rescous.

“*Pur son rent arere.*” Here Littleton decideth an antient question in our bookes, [p] viz. that the rent must be behind, or else the tenant may make rescous: for if no rent be behind when the distresse is taken, how can the rescous amount to a disseisin of the rent when none is due? And so it is, if the tenant resist the lord to distreine, when there is no rent behind, this can be no disseisin of the rent for the cause above sayd, and this (as it appeareth by Littleton) holdeth as well in case of a rent service between lord and tenant, as in case of a rent charge, &c. And so I heard sir Christopher Wray chief justice say, that he had adjudged it. And that which the tenant may do when there is no rent behind, may a stranger doe, if his beasts be distrained. If the tenant tender the rent to the lord when he is to take the distresse, if notwithstanding the lord will distrayne, the tenant may make rescous (4) If the rent of the lord be behind, and the lord distreine the cattell of the tenant in the high way within his fee, the tenant may make rescous, for that it is defended by law to distreine in the (1) high way. [161. a.] And by the same reason if the lord will distreyne *averia caruæ*, where there is a sufficient distresse to be taken (2) besides, or if the

lord

(1) *encloses* not in L. and M. but in Roh. P. and Red.

(2) *de le distresse* not in L. and M. Roh. nor P.

(3) [See Note 293.]

(4) [See Note 294.]

[161. a.]

(1) [See Note 295.]

(2) Acc. ant. 47. a. and more at large in 2. Inst. 133.

7. E. 4. 24. (5. Co. 76.) 17. E. 3. 43. Vid. tit. Rescous 14.

lord distrayne any thing that is not distreynable, either by the common law, or by any statute, the tenant may make rescous.

Note, there is a rescous in deed and a rescous in law. Of a rescous in deed somewhat hath already been spoken. A rescous in law is, when a man hath taken a distresse, and the cattle distreyned as he is driving of them to the pownd goe into the house of the owner, if he that tooke the distresse demand them of the owner, and he deliver them not, this is a rescous in law, and so of the like.

And every word of *Littleton* is materiall, for he saith;

“*En la terre tenus de luy.*” And therefore if the lord distreyne out of his fee in lands not holden of him, the tenant may make rescous, unless it bee in some speciall cases.

As if the lord come to distreyne cattle which he seeth then within his fee, and the tenant or any other to prevent the lord to distreyne, drive the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distreyne the cattle, and the tenant cannot make rescous, albeit the place wherein the distresse is taken is out of his fee, for now in judgement of law the distresse is taken within his fee, and so shall the writ of rescous suppose.

But if the lord comming to distreyne had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view goe out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distresse, then cannot the lord distreyne them out of his fee, and if he doth the tenant may make rescous.

If a man come to distreyne for *damage feasant*, and see the beasts in his soyle, and the owner chase them out of purpose before the distresse is taken, the owner of the soyle cannot distreyne them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distresse; and so note a diversitie.

There is a diversitie [a] betweene a warrant of record and a warrant or an authoritie in law; for if a *capias* be awarded to the sherife, to arrest a man for felony, albeit the party be innocent yet cannot he make rescous. But if a sherife will, by authoritie which the law giveth him, arrest any man for felony which is not guiltie, he may rescue himselfe. (3)

“*Replevin*” [b] is derived of *replegiare*, to redeliver to the owner upon pledges or suretie.

[c] Also to counterplead the plaintife in an assise, by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is, if he had pleaded *nul tort*, &c.

“*Encloser*” is here also described, and need no other explication; for the lord cannot [d] breake open the gates, or breake down the inclosures to take a distresse, and therefore the law accounts it a disseisin. But all these are intended by *Littleton* to be disseisins after an actuall seisin had, and when the rent is behind: otherwise none of these are disseisins at all.

But

(Ant. 47. b.
F. N. B. 102. C.)
3. E. 3. Rescous
12.

44. E. 3. 20.
6. R. 2.
Rescous 11.
11. H. 7. 4.
21. H. 7. 40.
34. H. 6. 18.
16. E. 4. 10.
lib. 9. fol. 22. In
case de Avowrie.
(9. Co. 22.
Plowd. 37. b.
38. a. 2. Inst. 131.
Post. 268. b.
1. Re. Abr.
671.)

16. E. 4. 10.
2. E. 2. Avowrie
182. lib. 9.
ubi supra.

[a] 14. H. 7. 20.
tit. Justice de
Peace 9.
(6. Co. 54. a.
3. Inst. 221.)

[b] Brit. fol. 108.
Fleta lib. 4.
cap. 1. Mirror
cap. 2. sect. 15.
(Ant. 145. b.)
[c] 24. Ass. 3.
29. Ass. 52.
Fleta lib. 4.
cap. 1. Britton
fol. 108.
[d] 10. E. 3. 9.
49. E. 3. 14.
7. E. 3. 3.
11. H. 7. 28.
8. Ass. 8.
10. E. 4. 2.

Bract. lib. 4.
fol. 161. 204.
Britton fol. 108.
Fleta lib. 4.
cap. 1.

But wherefore should a rescous of the distresse by the party himselfe, or a replevin, which is a redelivery of the distresse by the sherife by the course of law to the partie, be any disseisin of the rent service? *Littleton* doth here yeeld the true reason; because that by the rescue, and by the suing of the replevyn, the lord is disturbed of the meane by the which he ought to have and come to his rent, viz. of the distresse.

[e] 9. Aff. 19.
Mirror ca. 2.
sect. 15. Brit.
fol. 108. 114.
118. 141.

And so it is of an incloser; for he that disturbs a man of the meane disseiseth him of the thing it selfe, [e] as the turning of the whole streame that runnes to a mill is a disseisin of the mill it selfe.

[f] 26. Aff. 17.
3. E. 4. 2. per
Littl.
49. E. 3. 14. b.
[g] F.N.B. 42. g.
22. E. 3. 15.
43. Aff. 40.
43. E. 3. 20.
faux judg. 10.
Cro. Eliz. 836.

So it is if a man be disturbed to enter and manure his land, [f] this is a disseisin of the land it selfe; for *qui adimit medium dirimit finem*, and *qui obstruit aditum destruit commodum*. [g] And therefore where it is said, that a man shall not be punished for suing of writs in the king's court, be it of right or wrong, it is regularly (4) true, but it fayleth in this speciall case of the writ of replevyn for the cause aforesaid. [b] But *denier* is no disseisin of a rent service without rescous or resistance.

8. E. 4. 15. per Moyle. 2. R. 3. 19. (Hob. 205. 266. 1. Mod. 4.
1. Sid. 463.) [b] 3. E. 3. 75. 8. H. 6. 11.

Sect. 238.

[161. b.]

ET sont 4 causes de disseisin de rent charge; scilicet, rescous, replevin, enclosure, et denier; car denier est un disseisin de rent charge, come est avantdit de rent secke.

AND there bee foure causes of disseisin of a rent charge; scil. rescous, replevin, inclosure, and deniall; for denyall is a disseisin of a rent charge, as is said before of a rent secke.

Britton ubi supra.
Fleta lib. 4.
cap. 1.

“*SONT 4 causes de disseisin de rent charge.*” And you may adde a fifth, viz. resistance to distreine, counterpleading and vouching a record and fayler thereof, as hath beene said before. (1)

14. E. 4. 4.
35. H. 6. 7.
3. Aff. 8.
10. E. 3. 9.
40. E. 3. 24.
3. H. 6. 35.
3. E. 3. 75.
29. Aff. 51.
39. Aff. 4.
40. Aff. 3.
13. E. 1.
4. Aff. 40.
3. Aff. 8.

“*Denier.*” Deniall is a disseisin of a rent charge, aswell as of a rent secke; albeit he may distreine for the rent charge, aswell as for a rent service. *Nota*, that when bookes say that a detainer of a rent charge or secke is a disseisin, it must be intended upon a demand made. (2)

If there be two joyn tenants, and the grantee of a rent charge distreine for the rent, and one of them make rescous, they are both disseisors; (3) for a distresse for the rent is a demand in law, and then the non-payment is a deniall and a disseisin; but he that made the rescous is onely the disseisor with force.

8. H. 6. 11. 18. E. 3. Aff. 78. (Cro. Cha. 507.)

(4) [See Note 297.]

scription of such a disseisin in Sect. 233.
See W. Jo. 414.

(3) See acc. as to attornment by one of two joyn tenants, Sect. 566.

[161. b.]

(1) Ant. 160. b.

(2) This is agreeable to *Littleton's* de.

Sect.

Sect. 239.

ET deux sont causes de disseisin de rent seck; cestascavoir, denier et enclosure.

AND there be two causes of disseisin of a rent secke; that is to say, deniall and inclosure.

THE reason, wherefore inclosure is a disseisin of a rent secke, is because the grantee cannot come upon the land to demand it.

33. H. 6. 35.

35. H. 6. 7. b.

49. E. 3. 15.

29. Aff. 5.

36. Aff. 7.

10. E. 3. 19.

Sect. 240.

ET il semble, que il y ad un autre cause de disseisin de tous les trois services avantdits; c'estascavoir, si le seignior soit en alant a la terre tenus de luy pur distreyner pur le rent arere, et le tenant ceo oyant luy encounter, et luy forstala la voy ovesque force et armes, ou luy menace en tiel forme que il ne oFAST vener a sa terre pur distreiner pur son rent arere pur doubt de mort, ou mutilation de ses membres, ceo est un disseisin, pur ceo que le seignior est disturbe de le meane per que il doit vener a son rent. Et issint est, si, per tiel forstallment ou menace, celuy que ad un rent charge ou rent secke est forstalle, ou ne oFAST vener a la terre a demander le rent arere, &c.

AND it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distreine for the rent behind, and the tenant hearing this encountereth with him, and forestalleth him the way with force and armes, or menaceth him in such forme that hee dare not come to the land to distreine for his rent behinde for doubt of death, or bodily hurt, this is a disseisin, for that the lord is disturbed of the meane whereby hee ought to come to his rent. And so it is, if, by such forestalling or menacing, hee that hath rent charge or rent secke is forestalled, or dare not come to the land to aske the rent behinde, &c.

"FORSTALLA," [*] forestellamentum, significeth *obstructionem* viae vel impedimentum transitus, &c.

[*] Fleta lib. 1. cap. 42.

49. E. 3. 14.

49. Aff. 5.

29. Aff. 49.

(3. Inst. 195)

"Ove force et armes," vi et armis.

[i] Vid. Sect.

431.

(Post 257. b.)

Force, vis, in [i] the common law is most commonly taken in all part, and taken for unlawfull violence, for *maximè paci sunt contraria vis et injuria*. And therefore Briston said well, speaking in the person of the king, *nos velons, que tous gents plais usent jugement que force*. (4) *Arma*. Armes, in the common law significeth any thing, that a man striketh or hurteth withall. [k] *Omnes illos di. imus armatos, qui habent cum quo necere possunt. Telum autem appellatur omnia, in quibus singuli homines nocere possunt, accipitur ut*

[A] Bracton lib.

4. to 162 & 16.

7. fol. 124.

Fleta lib. 2.

Sed cap. 4.

(4) Br. 116 a.

Sed si quis venerit sine armis, et in ipsâ concertatione ligna sumpserit, fustes et lapides, talis dicetur vis armata: sed si quis venerit cum armis, armis tamen ad dejiciendum non usus fuerit, et dejecerit, vis armata dicitur esse facta, sufficit enim terror armorum ut videatur armis dejecisse. And, *Armorum quædam sunt tuitionis (et quod quis ob tutelam corporis sui vel sui juris fecerit, justè fecisse videtur) quædam pacis et justitiæ, quædam perturbationis pacis, et injuriæ; quædam usurpationis rei alienæ.*

Againe, *Armorum quædam sunt moluta, et quædam quæ faciunt brustum, etc. Arma moluta plagam faciunt; sicut gladius, bisacuta, et hujusmodi, ligna verò et lapides brusturas, orbis, et ictus, etc.* To conclude this, it is truly said, that *armorum appellatione non solum scuta et gladii et galeæ continentur, sed et fustes et lapides.* As the poet saith:

(3. Inf. 161,
162.)

Virgil 1.
Æneid.

Jamque faces et saxa volant; furor arma ministrat.

Sed vim vi repellere licet, modò fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.

Bracton lib. 2.
16. Britton fol.
19. & 88.
Fleta lib. 3. ca. 7.
(Post. 253. b.)
* See of this in
the Chapter of
Descents,
49. E. 3. 14.
49. Aff. 5.
29. Aff. 49. &c.
[1] Vid. Sect.
589.

“ *Pur doubt de mort, et mutilation de ses members.*” For it must not be *vagus & vanus timor, sed talis qui cadere possit in virum constantem, et non in hominem vanum et meticulosum, talis enim debet esse metus, qui in se continet mortis periculum et corporis cruciatum.* Littleton here saith, it must be for feare of death * or mutilation of members. *Et nemo tenetur exponere se infortuniis et periculis.* (1) And therefore a forestalment with such a menace is a disseisin, not onely (saith Littleton) of a rent service, but also of a rent charge and rent secke. These be all the disseisins of a rent that our author speakes of. See hereafter [1] where a disseisin shall be by way of admittance of the owner of the rent. And Littleton doth adde the binding reason in case of forestalment, because the lord is disturbed of the meane by which he ought to come to his rent, whereof there hath beene spoken sufficient before, (2) as well in case of the rent charge and rent secke, as of the rent service.

“ &c.” Of the (&c.) in the end of this Section, and what is implied therein, sufficient hath beene spoken before.

* 32. H. 8. ca. 37.
(5. Co. 118.
Dy. 375. b.
7. Co. 39. b.
Ant. 148. a.)

Now hath Littleton spoken of remedies for the recovery of the arrerages of rents. But since Littleton's time a right profitable statute * in the 32. yeare of H. 8. hath beene made for the recovery of arrerages of rents in certaine cases where there lay no remedy at the common law, and giveth further remedy in some cases where at the common law there was some (3) remedy; which statute hath beene well and beneficially expounded; and hereupon eight things are to be observed.

4. Co. 49, 50. a.
Ognell's case.

1. When Littleton wrote, the heires, executors, or administrators, of a man seised of a rent service, rent charge, rent secke, or fee farme, in fee simple or fee taile, had no remedy for the arrerages incurred in the life of the owner of such rents. But now a double remedy is given to the executors or administrators for payment of debts, &c. viz. either to disfreine or to have an action of debt.

2. That

(1) See more fully on this subject post.
253. b.

(3) See as to this point infra note 4. and
162. b. note 1.

(2) Ant. 161. a.

2. That the preamble of the statute concerning executors or administrators of tenant for life is to be intended of *tenant pur autre vie*, so long as *cestuy que vie* liveth; (4) who are also holpen by the said double remedy. But after the estate for life determined, his executors or administrators might have had an action of debt by the common law; but they could not have distreyned, which now they may doe by force of this statute; for in that point it addeth [m] another remedy than the common law gave. (1)

distion 22. (Cro. Cha. 471, 472.)

[m] 23: Eliz. Dier 375.

40. E. 3.
Execution 98.
45. E. 3. lib. 71.
9. H. 6. 43.
14. H. 8. 20.
19. H. 6. 43.
34. H. 6. 20.
32. E. 3. Det. 9.
9. H. 7. 17.
19. E. 3. jurif.
(Ant. 146. b.)

3. If a man make a lease for life or lives, or a gift in taile, reserving a rent, this is a rent service within this statute.

4. The distresse is the more plaine and certain remedy than the action of debt; for the action of debt must be brought against them that tooke the profits when the rent became behinde, or against their executors or administrators; but the distresse may be taken upon the land be it either in the tenant's owne hands or in the hands of any other that claimes by or from him (that is by interpretation under him) by purchase, gift or descent. And these words, *claiming onely by and from him*, are to be understood claiming onely from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheate claimeth not under the tenant by purchase, gift, or descent, but by reason of his feigniory, which is a title paramount. (2)

26. E. 3. 64.
11. H. 4. fol. ult.
Oguel's case ubi
supra. & 7. Co.
39. b. Lilling-
ton's case.

5. If there be lord and tenant, and the rent is behinde, and the lord grant away his feigniory, and dyeth, the executors shall have no remedy for these arrerages; because the grantor himself had no remedy for them when he dyed in respect of his grant, and the statute is (in like manner as the testator might or ought to have done) *Et sic de similibus*; for the act giveth no remedy, when the testator himselfe hath dispenced with the arrerages, or had no remedy when he dyed. (3)

(2. Sid. 29.)

6. If the tenant make a lease for life, the remainder for life, the remainder in fee, the tenant for life payes not the rent due to the lord, the lord dyeth, the tenant for life dyeth: the executors cannot distreine upon him in remainder, because he claimes not by or from the tenant for life. And so it is of a reversion for the cause aforefaid. But if a man grant a rent charge to *A.* for the life of *B.* and letteth the lands to *C.* for life, the remainder to *D.* in fee, the rent is behinde by divers yeares, *B.* dyeth, and after *C.* dyeth: *A.* may distrein *D.* in remainder for all the arrerages, by the latter branch of the statute of 32. H. 8. And this diversity riseth upon the severall pennings of the former branch and of this latter, which you may reade in the statute it selfe, and so expounded and adjudged [o] in *Edridge's* case, and the latter clause giveth the lesser estate the greater remedy.

(4. Co. 51.)

[o] 5. Co. 118.
Edridge's case.

7. For the arrerages of a *nomine pænæ*, and for reliefe, or for aid *pur faire fits chivaler* or *pur file marier*, this statute * giveth no remedy. For, for the arrerages of the *nomine pænæ*, the grantee himselfe

* 40. E. 3. 3. b.
11. H. 4. 85
14. E. 4. 4.

(4) [See Note 298.]

[162. b.]

(1) [See Note 299.]

(2) For other cases not within the statute on a like ground, see Cro. Eliz. 332. 1. Leon.

302. 2. Vern. 612. See also on the extent of this branch of the statute *Edridge's* case. 5. Co. 118.

(3) Acc. by Vaughan chief justice, in his Reports 40.

20. H. 7. 1. a.
 28 H. 8.
 Dier 24.
 [p] 34. E. 1.
 Avowry 233.
 F. N. B. 122.
 10. H. 6. 11.
 11. H. 6. 8.
 Mich. 32. H. 3.
 Rot. 429.
 Leake's case.
 Oguel's case
 ubi supra.
 3. E. 3. Debt 157.
 (3. Co. 66.
 Cro. Eliz. 893.)
 [q] W. 1. ca. 36.
 F. N. B. 82. 122.

himselfe may have an action of debt, and consequently his executors or administrators; and yet the *nomine pænæ* as an incident to the rent shall descend to the heire. For reliefe the lord cannot have an action of debt, but distreine; but his executors by [p] the common law shall have an action of debt (4), for it is no rent but a casual improvement of services. For the said aides, if the lord doth levy them, the sonne and the daughter respectively shall have an action of debt against the executors or administrators of the lord, and if they have nothing, then against the heire; but this is by the statute (q) of W. 1. *Note*, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yeelded, and whether they be annuall or every two, three or four yeares, &c. or the like, are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

[r] 26. E. 3. 64.
 10. H. 6. 11.
 (Cro. Jam. 28.)
 * 22. H. 6. 25.
 F. N. B. 121.
 (Post. 351. b.)
 [s] Hill. 17.
 Eliz. Rot. 457.
 inter Sharpe &
 Polc. Vide
 Oguel's case
 ubi supra.
 [t] 19. E. 3.
 Jurisdic. 22.

8. A feme sole is seised of a rent in fee, &c. which is behinde and unpaid; she taketh husband; the rent is behinde again; the wife dyeth: the husband by the common law should not have the arrerages growne due before the mariage, but for the arrerages become due during the coverture the husband might [r] have an action of debt by the common law. But now this statute * by a particular clause giveth the husband the arrerages due before mariage, and the said double remedy for the same, that he may distreine for the arrerages growne due during the coverture. So it giveth him that which he could not have before, and further remedy for that which the common law gave him. And so it hath beene [s] adjudged.

The bishop of [t] *Norwich* had the first-fruits of all the clergy within the diocesse at every avoydance; the church became void, and another parson became incumbent, who paid the bishop parcell of his first-fruits according to the taxation of the church, and for the rest he had a day given unto him to pay it; the bishop dyed; the residue was not payd, whereupon his executors brought an action of debt: and it is adjudged that no action doth lie, because it is a meere spirituall thing and no lay contract, and therefore the court had no jurisdiction to hold plea of it.

I have beene the longer in the exposition of the said statute, (5) for that it is a generall case, and doth concerne most part of the subjects of England. (6)

Finis Libri Secundi.

(4) Adjudged accordingly in a case in Noy 43. and Cro. Eliz. 883. See also acc. ant. 83. a. & b.

(5) In 18. Vin. Abr. 542. most of the cases on this statute since lord Coke's time

will be found distributed according to the several clauses. See also Gilbert on Actions of Debt, b. 1. chap. 2. & 3.

(6) [See Note 300.]

THE
T H I R D B O O K
OF THE
F I R S T P A R T
OF THE
I N S T I T U T E S
OF THE
L A W S O F E N G L A N D. (1)

CHAP. I.

Of Parceners.

Sect. 241.

PARCENERS sont en deux maners; c'estascavoir; parceners solonque le course del common ley; et parceners solonque custome. Parceners solonque le course del common ley sont, lou home, ou feme, seisie de certaine terres ou tenements en fee simple ou en taile, n'ad issue forsque files, et devie; et les tenements discendent a les issues (2), et les files entrent en les terres ou tenements issint descendus a eux, donques els sont appels parceners, et quaut a files els sont (1)† forsque un heire a leur ancestor. Et els sont appel parceners; pur ceo que per le brieve, que est appel brieve de participatione faciendâ, la ley eux vet cohercer, que partition serra fait enter eux. Et si sont deux files al queux les terres discendent, donque els sont appels deux parceners; et si sont trois files, donque els sont appels trois parceners; et si quater files, quater parceners; et issint ouster. (2)†

PARCENERS are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custome. Parceners after the course of the common law are, where a man, or woman, seised of certain lands or tenements in fee simple or in taile, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them; then they are called parceners, and be but one heire to their ancestor. And they are called parceners; because by the writ, which is called *breve de participatione faciendâ*, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they bee called two parceners; and if there be three daughters, they bee called three parceners; and foure daughters, four parceners; and so forth.

OUR

(1) [See Note 1.]

(2) In L. and M. and in Roh. it is *filles* instead of *issues*.

(1)† See below note 3.

(2)† In L. and M. and in Roh. an &c. comes in here.

OUR author having treated in his two former bookes, first of estates of lands and tenements, and in his second booke of tenures whereby the same have beene holden, now in his third booke doth teach us divers things concerning both of them; as, 1. The qualities of their estates. 2. In what cases the entry of him that right hath may bee taken away. 3. The remedies, and in what cases the same may be prevented, or avoyded. 4. How a man may bee barred of his right for ever, and in what cases the same may be prevented or avoyded.

Vide Sect. 385.

For the first, he, having spoken of sole estates, divideth the quality of estates into individed and conditionall. Individed, into coparcenary, joynTENANCY, and tenancy in common. Coparcenary into parceners by the common law, and parceners by the custome; and he beginneth his third booke with parceners claiming by descent, which, comming by the act of law and right of blood, is the noblest and worthiest meanes whereby lands doe fall from one to another. Conditional, into conditions expresse or in deed, and conditions in law. Conditions in deed, into gages; which he divideth into *vadia mortua*, and *vadia viva*. *Vadia mortua*, so called because either money or land may be lost: and *viva*, because neither money nor land can be lost, but both preserved. Then speaketh he of descents, whereby the entry of him that right hath may be taken away. And next to that of the remedy how to prevent the same, viz. by continuall claim. Then he teacheth, how a man, having a defeasible or an imperfect estate, may perfect and establish the same by three meanes, viz. by release, by confirmation, and attornment, where that is requisite. Having spoken of a descent, being an act in law which taketh away an entry, he doth then speake of a discontinuance, the act of the party, whereby the entry of them that right have shal be taken away. And next unto that he teacheth in what case the same may be avoyded by remitter. After he had treated of descents and discontinuances, which take away entries, but barre not actions, lastly, he setteth forth the learning of warranties, (a curious and cunning kind of learning I assure you) whereby both entry, action, and right may be barred, and the remedies how they may be prevented before they fall, and in what cases they may be avoyded after they be fallen. And thus have you an account of the thirteene severall chapters of his third booke. And now his method being understood, let us heare what our author will say unto us concerning parceners.

[163. b]

[a] Bract. lib. 2.

fo. 66. 71. &c.

& 76. &c. &

lib. 5. fo. 443.

Brit. fo. 58. 112.

128. 183. 184.

185. 189. 193.

Flet. lib. 5. ca. 9.

li. 6. ca. 47.

Glan. li. 7. ca. 3.

& li. 13. c. 11.

[b] Bract. li. 2.

fo. 66. 76. Flet.

ubi supr. Brit.

ubi supr. & Statut.

de Hiberh.

[c] Vide Sect. 8.

verf. fin.

“ Et quant a files els sont fersque un heire a leur [a] ancestor.”
This is false printed; for the originall is, *et quanque files els sont, els sont parceners, et sont fersque un heire a leur aunccestor.* (3)

“ Parceners.” [b] *Jus descendit quasi uni hæredi propter juris unitatem, sicut sunt plures filie, &c. Et ubi omnes simul et in solidum hæredes sunt, plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent.* Whereupon it followeth, that albeit where there bee two parceners [c] they have moities in the lands descended to them, yet are they both but one heyre; and one of them is not the moiety of an heire, but both of them are but *unus heres*.

And it is to be observed, that there is a diversity betweene a descent, which is an act of the law, and a purchase, which is an act of

(3) The words are as here corrected by lord Coke both in L. and M. and in Reh.

of the party. [d] For if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony, the father dieth both daughters being alive; the one moitie shall descend to the one daughter, and the other moitie shall escheat. But if a man make a lease for life, the remainder to the right heires of A. being dead, who hath issue two daughters, whereof the one is attainted of felony; in this case some have said, that the remainder is not good for a moitie, but voyd for the whole, for that both the daughters should have beene (as *Littleton* saith) but one heire. (4)

[d] Fleta lib. 5.
ca. 9. Fleta lib.
6. ca. 47.

[164. a.] A man makes a gift in taile, reserving two shillings rent to himselfe during his life, and if he die his heire within age then reserving a rent of twentie shillings to his heires for ever; he dieth having issue two daughters, the one of full age, the other within age: in this case the donee shall hold by fealtie onely, insomuch as the one daughter as well as the other is his heire, and both of them (as *Littleton* saith) make but one heire, ergo, his heire is not within age, neither is his heire in that case of full age. But if the reservation had been, "and if he die, his heire neither being within age, nor of full age, &c." in this case the reservation had beene good. And if it doth not begin in his next heire, it shall never begin as this case is, for that the precedencie is not performed. (Post. 196. b.)

[e] But yet if one of them be of age, and the other within age, she shall have her age and other priviledges and advantages that an heire within age shall have; and when they are demandants, for the nonage of the one the paroll shal demurre against them both (1). [f] *Sunt autem plures participes quasi unum corpus in eo quod unum jus habent; et oportet quod corpus sit integrum, et quod in nullâ parte sit defectus.* And when the right heire doth claime by purchase, he must be (say they) a compleat right heire in judgement of law. (2) And therefore if lands be given to a man and to the heires females of his bodie, and he hath issue a son and a daughter, and dieth, the daughter shall have the land by descent; but if a remainder be limited to the heires females of the bodie of I. S. and he hath issue a sonne and a daughter, his daughter shall never take it by purchase, for that she is not heire female of the body of I. S. because he hath a sonne.

[e] Temps E. 1.
Age 128. S. E. 2.
Judgement 240.
30. E. 3. 7.

44. E. 3. Age 47.
26. Aff. 65.

13. E. 3. Age 51.
28. Aff. 22.

29. Aff. 25. 57.

34. H. 6.

4. Aff. 17.

[f] Fleta lib. 5.
ca. 9. et lib. 6.

cap. 47.

(1. Co. 103.

2. Ro. Abr. 416.)

If a man give lands to another, and to the heires males of his body, upon condition, that if he die without heire female of his bodie, that then the donor shall re-enter, this condition is utterly voyd, (3) for he cannot have an heire female, so long as he hath an heire male.

And as they be but one heire, and yet severall persons; so have they one entire freehold in the land, as long as it remains undivided, in respect of any stranger's *præcipe*. [g] But betweene themselves to many purposes they have in judgement of law severall freeholds; for the one of them may infeoffe another of them of her part, and make liverie. [h] And this coparcenarie is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue, and one *præcipe* shall lie against them, for they shall never joyne as heires to severall auncellors in any action auncellrell, but when one right descends from one auncellor :

[g] 10. E. 4.

17. E. 3. 46.

(Mo. 60.)

[h] 37. H. 6. 8.

19. H. 6. 45.

(Post. 196. a.)

(4) [See Note 2.]

(2) [See Note 4.]

(3) As to effect from a condition's being void, see post. 206. a. & b.

[164. a.]

(1) [See Note 3.]

auncestor : and then *propter unitatem juris*, though they be in severall degrees from the common auncestor, yet shall they joyne. But the issues of severall coparceners, because severall rights descend, shall never joyne as heires to their mothers ; and yet when they have recovered, a writ of partition lieth betweene them.

Vid. Sect. 313.

[i] 7. E. 3. 30. 34.

48. E. 3. 14.

24. E. 3. 13.

F. N. B. 221.

35. H. 6. 23.

27. E. 3. 89.

31. H. 6. 14. b.

[k] 37. H. 6. 8.

9. E. 4. 13. b.

42. E. 3. 16, 17.

(8. Co. 86. Post.

196. a. 364. b.)

For example, [i] If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issues shall joyne in a *præcipe* ; because one right descends from the auncestor ; and it maketh no difference, whether the common auncestor, being out of possession, died before the daughters or after, for that in both cases they must make themselves heires to the grandfather which was last seised, and when the issues [k] have recovered they are coparceners, and one *præcipe* shall lie against them. And likewise if the issues of two coparceners, which are in by severall descents, be disseised, they shall joyne in *assise*. But in the same case if the two daughters had beene actually seised, and had beene disseised, after their deceases the issues shall not joyne ; because severall rights descended to them from severall auncestors : and yet when they have severally recovered, they are coparceners, (4) and one *præcipe* lieth against them, and a release made by one of them to the other is good. And so note a diversitie *inter descensum in capita, et in stirpes*.

(F. N. B. 195. H.)

[l] Bracton, lib. 4. 254. b. Britton fol. 181, 182. & 178. 204. Fleta lib. 5. cap. 1. et 2. & 9. in fine.

[m] 19. E. 3. tit. Joyndre in Action 31.

7. E. 3. 30. et 34.

27. E. 3. 89.

48. E. 3. 14.

24. E. 3. 13.

F. N. B. 221.

Register. Vide

32. E. 1. Joyndre

in Action 34.

13. E. 3. ibid. 29.

temps E. 2. ib. 35.

30. E. 1. ibid. 36.

25. H. 6. 23.

[n] Bracton lib.

2. 66. Britton

cap. 71. Fleta

lib. 5. cap. 9. et

6. cap. 47.

And the statute of Gloucester, cap. 6. made anno 6. Edw. 1, speaketh *si homo morietur*, &c. if a man dieth : so as that statute extendeth not but where one dieth, and hath divers heires, whereof one is sonne or daughter, brother or sister, nephew or neece, and the others be in a further degree, all their heires from henceforth shall have their recoverie by writ of mortdaucestor. And this seemeth to me to be the common law ; for Bracton, who writ before this statute, saith, [l] *in casu cum sit assisa mortis antecessoris conjungenda cum consanguinitate, non erit postea recurrendum ad præcipe de consanguinitate, sed ad assisam mortis ; quia persona, quæ propinquior est, et facit assisam, et trahit ad se personam et gradum remotiorem ut ubi potius procedat assisa quàm præcipe, quia id, quod est magis remotum, non trahit ad se quod est magis junctum, sed è contrario in omni casu*. And herewith agreeth the most of our [m] bookes ; and two coparceners shall have a writ of *ayel*, and by their count suppose the common auncestor to be grandfather to the one, and great grandfather to the other. (5)

I have beene the longer herein, for that this inheritance of coparceners is the rarest kind of inheritance that is in the law.

Furthermore it is to be observed that herein also in case of coparceners, [n] sometimes the descent is *in stirpes* (viz.) to stocks or roots ; and sometime *in capita*, to heads. As if a man hath issue two daughters and dyeth, this descent is *in capita*, viz. that every one shall inherit alike, as Littleton here saith. But if a man hath issue two daughters, and the eldest daughter hath issue three daughters, and the youngest one daughter, all these foure shall inherit ; but the daughter of the youngest shall have as much as the three daughters of the eldest, *ratione stirpium*, and not *ratione capitum*, for in judgement of law every daughter hath a severall shecke or root.

Also if a man hath issue two daughters, and the eldest hath issue divers sonnes and divers daughters, and the youngest hath issue divers daughters, the eldest son of the eldest daughter shall onely inherit ;

[164. b.]

(4) See the like as to jointenants, post. 18. a.

(5) See F. N. B. 197. B.

inherit; for this descent is not *in capita*, but all the daughters of the yongest shall inherit, and the eldest son is coparcener with the daughters of the yongest, and shall have one moitie (viz.) his mother's part; so that men descending of daughters may be coparceners, as well as women, and shall joyntly implead and be impleaded, as is afore said.

[o] If there be two coparceners, and the one bring a *rationabili parte* or a *nuper obiit* against the other, the defendant claime by purchase, and disclaime in the blood, the plaintife shall have a *mortdauncester* against her as a stranger for the whole. (1)

[o] 20. E. 2.
nuper ob. 14.
F. N. B. 197.
7. E. 3. 13.

"*Parceners sont en deux manners.*" Here Littleton doth divide parceners; and herewith doe agree the ancient bookes of law.

Bract. lib. 2.
fo. 66. 71, &c.
Brit. ca. 71.
Fleta li. 5. ca. 9.

"*Et ils sont appels parceners, &c.*" Parceners, *participes*, et *dicuntur participes*, *quasi partis capaces*, sive *partem capientes*; *quia res inter eas est communis ratione plurium personarum*. This tenencie in the ancient books of law is called *adæquatio*, and sometime *familia hirciscunda*, (2) an inheritance to be divided; and many times parceners are called coparceners.

"*Breve de participatione faciendâ.*" This is false printed, (3) and should be *De partitione faciendâ*, (4) a writ whereby the coparceners are compelled to make partition. [p] *Item est alia actio mixta, quæ dicitur actio familiæ hirciscundæ; et locum habet inter eos qui communem habent hæreditatem, &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de proparte sororum; vel inter alios, ubi res inter partes et cohæredes dividi debeat, sicut sunt plures sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures, masculos, &c.*

[p] Regist.
Orig. 76. 316.
Regist. Jud.
80. Brit. ubi
sup. Flet.
ubi sup. Bract.
ubi supra. &
5. Co. 443. b.

"*Des terres et tenements.*" It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made betweene them. Wherein it is to be observed, that of inheritances some be entire and some be severall: againe, of entire, some be divisible, and some be indivisible. And here it appeareth by Littleton, that parceners take their appellation, because they are compelled to make partition by writ of *partitione faciendâ*; where, note, that Littleton alloweth well to finde out the true derivation of words, as often hath beene and shall be observed.

(Ant. 32. a.
150, 151.)

If a villeine descend to two coparceners, this is an entire inheritance; and albeit the villeine himselfe cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one weeke, &c. and the other another day or weeke, &c. And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the Chapter of Dower. (5) Likewise an advowson is an entire inheritance; [7] and yet in effect

[7] 13. E. 2. tit.
Quar. Imp. 170.
17. E. 3. 38.
Flet. li. 5. c. 9.
Mirr. ca. 2. sect.
the 17.

(1) See post. 175. 242. a.

(2) See the verb *hircisco* or *ercisco* used ant. 86. a.

(3) But in L. and M. and in Roh. it is the same.

(4) Monsieur Houard derives this writ from the capitalars of the first French kings. 1. Hou. Littl. 318.

(5) Ant. 32. a.

the same may be divided between coparceners, for they may divide it to present by turnes. (6)

[r] 44 E. 3. tit. Partic. 6 & tit. Avowrie 75. (2. H. 6. fol. 11. Ant. 148. a.) A rent charge is entire, and against common right; [r] yet may it be divided between coparceners, and by act in law the tenant of the land is subject to severall distresses, and partition may be made before seisin of the rent.

Entire inheritances not divisible, we finde divers in our bookes; and some inheritances that are divisible, and yet shall not be parted or divided between coparceners, as hereafter shall appeare.

[s] 2. E. 2. tit. Dower 123. [t] 17. E. 2. nuper obiit 12. 16. E. 2. ibid. 11. 5. Mariæ Dier 153. [u] 17. E. 3. 72. [w] 13. E. 2. Quare Imped. 170. Fletalib. 5. ca. 9. [x] Mich. 24. et 25. Eliz. inter Comitum de Huntingdon et Seigneur Mountjoy. (Mo. 174.) [s] If a man have reasonable estovers, as housebote, heybote, &c. appendant to his freehold, they are so entire as they shall not be divided between coparceners. [t] So if a corody incertaine be granted to a man and his heires, and he hath issue divers daughters, this corodie shall not be divided between them; but of a corodie certaine partition may be made.

[u] Homage and fealtie cannot be divided between coparceners (7). [w] So a pifchary incertaine, or a common *sauns nombre*, (8) cannot be divided between coparceners, for that would be a charge to the tenant of the soile.—[x] The lord Mountjoy, seised of the mannor of Canford in fee, did by deed indented and inrolled bargaine and sell the same to Browne in fee, in which indenture this clause was contained. *Provided alwayes, and the said Browne did covenant and grant to and with the said lord Mountjoy, his heires and assignes, that the lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were greates wꝑꝑꝑꝑ) parcell of the said mannor, and to dig turfe also for the making of allome.* And in this case three poynts were resolved by all the judges. First that this did amount to a grant of an interest and inheritance to the lord Mountjoy, to digge, &c. Secondly, that notwithstanding this grant Browne his heires and assignes might dig also, and like to the case of common *sauns nombre*. Thirdly, that the lord Mountjoy might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the lord Mountjoy, &c. assigne his interest in any part of the wast to one or more, for that might worke a prejudice and a surcharge to the tenant of the land; and therefore if such an incertaine inheritance descendeth to two coparceners, it cannot be divided between them. (1)

(6. Co. 1.) But then it may be demanded, what shall become of these inheritances? The answer is, that it appeareth in our bookes, that regularly [y] the eldest shall have the reasonable estovers, common, pifchary, corody incertaine, &c. and the rest shall have a contribution, that is, an allowance of the value in some other of the inheritance, and so of the like. But what if the common ancestor left no other inheritance to give any thing in allowance, what contribution or recompence shall the younger coparceners have? It is answered, that if the estovers or pifchary or common be incertaine, then shall one coparcener have the estovers, pifchary, or common, &c. for a time, and the other for the like time; as the one for one yeare, and the other for another, or more, or lesser time, whereby

[165. a.]

(6) See an instance of a partition of an advowson between joyntenants in Carth.

149. a. See the note on this sort of common, ant. 122. a.

55.

(7) See ant. 67. b. and Dav. Rep. 61. b.

[165. a.]

(8) Acc. as to common *sauns nomb* e, ant.

(1) [See Note 5.]

no prejudice can grow to the owner of the soile. Or in case of the pishary, the one may have one fish, and the other the second, &c. or the one may have the first draught, and the second the second draught, &c. And if it be of a park, one may have the first beast, and the second the second, &c. And if of a mill, one to have the mill for a time, and the other the like time; or the one one toll dish, and the other the second, (2) &c. And this appeareth to be the ancient law; for it is said [z] *Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ, cum dividi non possunt, conceduntur uni; ita quod aliæ cohæredes alibi de communi hæreditate habeant ad valorem, sicut sunt vivaria, piscariæ, parci; vel saltem quod partem habeant pro defectu, sicut secundum piscem, tertium vel quartum; vel secundum tractum, tertium vel quartum. Item, in parcis secundam, tertiam aut quartam bestiam.*

[z] Bracton lib. 2. 76. Britton cap. 71, 72. Fleta lib. 5. cap. 9.

But now let us turne our eye to inheritances of honor and dignity. And of this there is an ancient booke case, [*] in 23. H. 3. tit. partition 18. in these words: Note, if the earldome of Chester descend to coparceners, it shall be divided betweene them as well as other lands, and the eldest shall not have this seigniory and earldome entire to herselfe; *quod nota*, adjudged *per totam curiam*. (3) By this it appeareth, that the earldome (that is, the possessions (4, of the earldome) shall bee divided; and that where there bee more daughters than one, the eldest shall not have the dignity and power of the earle, that is, to bee a countesse. What then shall become of that dignity? The answer is, [a] that in that case the king, who is the soveraigne of honour and dignity, may for the incertaintie conferre the dignity upon which of the daughters he please. And this hath beene the usage since the Conquest, as it is said. (6)

(Ant. 18. b. 27. a.)
[*] 23. H. 3. tit. partition 18.

But if an earle that hath this dignity to him and his heires dieth, having issue one daughter, the dignity shall descend to the daughter; for there is no incertaintie, but onely one daughter, and the dignity shall descend unto her and her posterity, as well as any other inheritance. And this appeareth by many precedents, and by a late judgement given in *Sampson Leonard's* case, who married with *Margaret* the only sister and heire of *Gregory Fines* lord *Dacre* of the South, and in the case of *William* lord *Ros*. (7)

[a] 3. H. 3. tit. prescription. (5)

But there is a difference betweene a dignity or name of nobility, and an office of honor. For if a man hold a manor of the king to be high constable of *England*, and dye having issue two daughters, the eldest daughter taketh husband, he shall execute the office (8) solely, and before marriage it shall be exercised by some sufficient deputy: and all this was resolved by all the judges of *England*, in the case of [b] the duke of *Buckingham*. But the dignity of the crowne of *England* is without all question descendible to the eldest daughter alone, and to her posterity, (10) and so hath it beene declared by act of parliament, [*] For, *regnum non est divisibile*. And so was the descent of *Troy*.

[b] 11. Eliz. Dier 285. the duke of Buckingham's case. (9)

[*] 25. H. 8. cap. 22.

*Præterea sceptrum, Ilione quod gesserat olim
Maxima naturam Priami.*—————

Virgil 1.
Æneid.

If

(2) How dower is to be assigned out of indivisible inheritances, see ant. 32. a.

(3) See Dav. Rep. 61. b.

(4) [See Note 6.]

(5) Fitz. Abr. partition 56.

(6) [See Note 7.]

(7) [See Note 8.]

(8) [See Note 9.]

(9) S. C. Keilw. 170. b. 4. Inst. 127.

(10) See ant. 15. b.

[b] Bracon lib.
2. fol. 76. Fleta
lib. 5. cap. 9.

[*] Britton 186.
187.

Vide Sect. 36.

[c] 29. E. 3.
garrantie 70.
(6. Co. 12. b.)
[d] Itin. Pickering.
8. E. 3.
Rot. 34.
(Ant. 115. a.)

[b] If a castle that is used for the necessary defence of the realme, descend to two or more coparceners, this castle might be divided by chambers and roomes, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided: for as one saith, *propter jus gladii dividi non potest*; and another saith, *[*] pur le droit del espée que ne sceffre division en aventure que la force del realme ne defaille pax taunt*. But castles of habitation for private use, that are not for the necessary defence of the realme, ought to bee parted betweene coparceners as well as other houses; and wives may thereof be endowed, as hath beene said in the Chapter of Dower. (11)

If there be two coparceners of certaine lands with warranty, and they make partition of the land, the warranty shall remayne; because they are compellable to make partition. [c] But otherwise it was of joyntenants at the common law, as shall be said hereafter in his proper place.—[d] *Thomas de Eberston*, seised of the mannor of *Eberston* within the forrest of *Pickering*, had kept time out of mind a woodward for keeping of the woods parcell of that mannor, and had the barke of all the trees felled in the said woods by any of the forresters of that forest as belonging to his mannor (which he could not have without a prescription). (1) *Thomas of Eberston* infeoffed two of the said mannor; betweene whom partition was made, so as one of them had the one halfe in fevralty, and the other the other halfe. (2) *Robert Wyerne* afterwards had the one halfe, and *Thomas Thurnise* the other; and they in the eyre of *Pickering* claimed to keepe a woodward within the said woods, and the barke aforesaid; and the truth hereof and the usage being specially found by the forrestors verderors and regardors, *Willoughby Hungerford* and *Hamburie* justices itinerants within that forrest gave judgment as followeth. *Ideo consideratum est, quod prædicti Robertus et Thomas habeant woodwardum et corticem in bosco prædicto de quercubus prædictis sibi et heredibus suis imperpetuum. Salvo semper jure, &c.*

[165. b.]

Sect. 242.

AUXY, si home seisie de tenements en fee simple ou en fee taile devy sauns issue de son corps engender, et les tenements descendent a ses soers, els sont parceners, come est avantdit. Et en mesme le maner, lou il n'ad pas soers, mes les tenements descendent a ses aunts, els sont parceners, (3) &c. Mes si home n'ad forsque une file, el ne poit estre dit parcener, mes el est appelle file et heire, &c.

ALSO, if a man seised of tenements in fee simple or in feetaile dieth without issue of his bodie begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shal not be called parcener, but shee is called daughter and heire, &c.

“ O U

(11) Ant. 31. b.

(2) [See Note 11.]

(3) *Els sont parceners* not in L. and M. nor Roh.

[15. b.]

(1) [See Note 10.]

“*O U en fee taile.*” This must be intended of an estate taile made to the father and to the heires of his body; for otherwise if the estate taile were made to a man and to the heires of his body, his sisters cannot inherit. And not only daughters shall be coparceners, but sisters, aunts, great aunts, &c.

“*File et heire, &c.*” Here by (*&c.*) is implied sister and heire, aunt and heire, great aunt and heire, and so upward.

Sect. 243.

ET est asçavoir, que partition enter parceners poit estre fait en divers manners. Un est, quant els agreeont de faire partition, et font partition de les tenements; sicome si soyent deux parceners, a devider enter eux les tenements en deux parts, chescun part per soy en severaltie et d'egal value; et si sont 3 parceners, a devider les tenements en trois parts per soy en severaltie, &c.

AND it is to bee understood, that partition may be made in divers maners. One is, when they agree to make partition, and do make partition of the tenements; as if there bee two parceners to divide between them the tenements in two parts, each part by it selfe in severalty and of equall value; and if there bee three parceners, to divide the tenements in three parts by it selfe in severalty, &c.

BY this Section, and the (*&c.*) in the end of it, it is to be understood, that there are two kind of partitions between coparceners; the one in deed or expresse, and the other in law or implicate. Of partitions in deed or expresse, some bee voluntary, whereof Littleton enumerates foure manners; and one compulsory, that is, by writ of partition. (4) (Ant. 46. a.)

[166. a.] The first partition in deed between coparceners, is that which Littleton here speaketh of, viz. *Quant els agreeont et font partition de les tenements, &c. chescun part per soy en severalty et de egal value, &c.* If coparceners make partition, at full age and unmarried, and of *sane memorie*, of lands in fee simple, it is good and firme for ever, albeit the values be unequall; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall bind the parties themselves, but not their issues unlesse it be equall; or if any be *covert*, it shall bind the husband, but not the wife or her heires; or if any be within age, it shall not bind the infants, as shall be said more fully hereafter (1). The second partition followeth in the next Section. And here the (*&c.*) implyeth further, that if there be foure parceners, then foure parts, if five, five parts, and so forth. It further implyeth, that all this must be in severalty; whereof, and with what limitations this is to bee understood, it hath beene declared before. (F. N. B. 167.) Vide Sect. 241.

(4) [See Note 12.]

[166. a.]

(1) See post. Sect. 255. to 258. inclusive. See also 173. b.

Sect. 244.

UN autre partition est, a eslier, per agreement enter eux, certaine de leur amies, de faire partition des terres ou tenements en le forme avantdit. Et en tiels cases, apres tiel partition, le eigne file prymerment esleira un des partes issint divides, que el voit aver pur sa part, et donques la second file procheine apres luy autre part, et donques la tierce soer autre part, donques le quarte autre part, &c. si issint soit que soient plusors soers, &c. si ne soit auterment agreee enter eux. Car il poit estre agreee enter eux, que un avera tiels tenements, et un autre tiels tenements, &c. sans ascun tiel primer election, &c.

ANOTHER partition there is, viz. to choose, by agreement betweene themselves, certaine of their friends, to make partition of the lands or tenements in forme afore said. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth another part, &c. if so bee that there bee more sisters, &c. unlesse it bee otherwise agreed betweene them. For it may be agreed betweene them, that one shall have such tenements, and another such tenements, &c. without any primer election.

31. Aff. 26.

“**D**ONQUES le quarte autre part, &c.” Here the (&c.) implyeth the 5 sister, and after her the 6, and so forth.

(1. Sid. 193.
269. Cro. Eliz.
664.)

(1. Sid. 339.)

“Car il poit estre agreee enter eux, que un avera tiels tenements, et un autre tiels tenements, &c.” Here by this (&c.) is implied divers rules of law proving the conclusion of *Littleton* in this Sect. viz. *Modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introducto.* but with this limitation that these rules extend not to any thing, that is against the common-wealth or common right. For *conventio privatorum non potest publico juri derogare.*

Sect. 245.

[166. b.]

ET la part, que l'eigne soer ad, est appellee en Latin *enitia pars*. Mes si les parceners agreeont, que l'eigne soer ferra partition de les tenements en le forme avantdit, et si ceo el fait, donque il est dit, que l'eigne soer esleira plus darreine pur sa part, et apres chescun de ses soers, &c. (1)

AND the part which the eldest sister hath, is called in Latine *enitia pars*. But if the parceners agree, that the eldest sister shall make partition of the tenements in manner afore said, and if she doe this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

“ENITIA

(1) The &c, not in L, and M. nor Roh.

"*ENITIA pars.*" It is called in old bookes * *eisnetia*, which is derived of the French word *eisne* for eldest, as much as to say the part of the eldest; for *Bracton* saith, *quod eisnetia semper est præferenda propter privilegium ætatis; sed esto, quod filia primogenita relicto nepote vel nepte in vitâ patris vel matris, decesserit, præferenda erit soror antenata tali nepoti vel nepti quantum ad eisnetiam, quia mortem parentum expectant.* And herewith agreeth *Fleta* also, *quod nota*: whereby it appeareth, that *enitia pars* is personall to the eldest, and that this prerogative or priviledge descendeth not to her issue, but the next eldest sister shall have it. [f] And here is a diversity to be observed betweene this case of a partition in deed by the act of the parties, for there the priviledge of election of the eldest daughter shall not descend to her issue; and where the law doth give the eldest any priviledge without her act, there that priviledge shall descend. As if there be divers coparceners of an advowson *, and they cannot agree to present, the law doth give the first presentment to the eldest; and this priviledge shall descend to her issue; nay her assignee shall have it; (2) and so shall her husband, that is tenant by the curtesie, have it also (3).

"*Donques il est dit l'eigne soer esliera plus darreine, &c.*" By this and the &c. in the end of this Section is implied, the rule of law is, *cujus est divisio, alterius est electio.* And the reason of the law is for avoyding of partiality,

(*Ipse etenim leges cupiunt ut jure regantur*)

which might apparently follow if the eldest might both divide and choose (4). Now followeth the third partition in deed.

* *Bract.* li. 2. 77.
Fleta lib. 5. ca. 9.
Britton ca. 72.

[f] 45. E. 3.
fin. 41. 19. E. 3.
quar. imp. 59.
 18. E. 2. *ibid.*
 176. 5. H. 5. 10.
 38. H. 6. 9.
Doct. & Stud.
 116, 117. *Vid.*
Bract. 238. 249.
 * 5. H. 7. 8.
 34. H. 6. 40.
 11. H. 4. 54.
 20. E. 3. *quar.*
imp. 63. 34. E. 3.
ibid. 198.
 15. E. 3. *Dar.*
Presentment 11.
 17. E. 3. 20, 21.
 21. E. 3. 21.
 F. N. B. 32.
 (Post. 18. b.)

Sect. 246.

UN autre partition ou allotment est, sicome soient quater parceners, et apres le partition de les terres fait, chescun part del terre soit per soy seulement escript en un petit escrovet, et soit covert tout en cere en le maner d'un petit pile, issint que nul poit veier l'escrovet, et donque soient les 4 piles de cere mis en un bonnet a garder en les maines d'un indifferent home, et donques l'eigne file primerment mettra sa maine en le bonnet, quel prendra un pile de cere ovesque le scrovet deins mesme le pile pur sa part, et donques le second soer mettra sa maine en le bonnet et prendra un autre, le tierce soer le 3 pile, et le 4 soer le 4 pile, &c. et en ceo cas covient chescun

ANOTHER partition or allotment is, as if there be foure parceners, and after partition of the lands be made, every part of the land by itselfe is written in a little scrowle and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the 4 balls of waxe are put in a hat to bee kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, and the 4 sister the 4 ball, &c.

(2) [See Note 13.]

(3) Agreed by lord Anderson in the case from Cro. Eliz. cited in the preceding note.

(4) See Hob. 107. where the doctrine is cited with approbation.

chescun de eux luy tener a sa chance et allotment.

&c. and in this case every one of them ought to stand to their chance and allotment.

* Flet. lib. 5.
ca. 9. Bracton
lib. 2. 75.
Britton cap. 72.

Vide Numbers.
ca. xxvi. verse 54,
55. & ca xxxiii.
ver. 54. of divi-
sion by lots.

“ALLOTMENT.” Of this partition by lots ancient authors * write, that in that case coparceners *fortunam faciunt judicem*. And Littleton here teacheth it chance; for in the end of this Section he saith, that in this case every of them ought to hold her selfe to her chance; and of this kinde of division you shall read in holy scripture, where it is sayd, *dedi vobis possessionem quam dividi-
deis sorte*.

The &c. in the end of this Section implyeth, that if there be more coparceners there must be more balls according to the number of the parceners.

Sect. 247.

ITEM, *un autre partition il y ad. Sicome sont quater parceners, et ils ne voient agreer a partition d'estre fait entre eux, dunque l'un poit aver brief de partitione faciendâ envers les autres trois, ou deux d'eux poient aver brief de partitione faciendâ envers les autres deux, ou trois de eux poient aver brief de partitione faciendâ envers le quart, à leur election.*

ALSO, there is another partition: As if there bee foure parceners, and they will not agree to a partition to bee made betweene them, then the one may have a writ of *partitione faciendâ* against the other three, or two of them may have a writ of *partitione faciendâ* against the other two, or three of them may have a writ of *partitione faciendâ* against the fourth, at their election.

HERE followeth the fourth partition in deed. Littleton having spoken of voluntary partitions, or partitions by consent: now he speakes of a partition by the compullary means of law where no partition can be had by consent. Now of what inheritance partition may be made by the writ of *partitione faciendâ* may partly appeare by that which hath beene sayd. Moreover it is to bee observed that the words of the writ *de partitione faciendâ* be, * *quod cum eadem A. et B. in simul et pro indiviso teneant tres acras terre cum pertinen*, &c. And note that this word (*tenet*) (1) in a writ doth alwayes imply a tenant of a freehold. And therefore [g] if one coparcener maketh a lease for yeares, yet a writ of partition doth lie (2). But if one or both make a lease for life, a writ of partition doth not lye betweene them: because *non in simul et pro indiviso tenent*, they doe not hold the freehold together, and the writ of partition must be against the tenant of the freehold. [b] If one coparcener disseise another, during this disseisin a writ of partition doth not lie betweene them; for that *non tenent in simul et pro indiviso*.

But

(1) See the various applications of the verb *tenet* explained ant. fol. 1. a. & b.

(2) [See Note 14.]

* 3.E.3.47,48.

[g] 21. E. 3. 57.
F. N. B. 62. g.
28. H. 6. 2.
11. H. 4. 3.
4. H. 7. 10. b.
(Post. 176. b.)
[b] 4. H. 7. 9.
11. Aff. 23.
(Post. 167. b.
187. a.)

But there be other partitions in deed then here have beene mentioned. [i] For a partition made between two coparceners, that the one shall have and occupy the land from *Easter* untill the first of August only in *severalty* by himselfe, and that the other shall have and occupie the land from the first of August untill the feast of *Easter* yearly to them and their heires, this is a good partition (3) *Also* if two coparceners have two mannors by descent, and they make partition, that the one shall have the one manor for one yeare, and the other the other manor for this yeare, and so *alternis vicibus* to them and their heires, this is a good partition. The same law is, if the partition be made in forme aforesaid, for two or more yeares, and each coparcener have an estate of inheritance, and no chattell, albeit either of them *alternis vicibus* have the occupation but for a certaine terme of yeares.

[i] Temps E. 1.
partition 21.
F. N. B. 62. l.
(7. Co. 5.)

Of partitions in law, some be by act in law without judgement, and some be by judgement, and not in a writ *de partitione faciendā*. And of these in order.

[k] If there be lord, three coparceners mesnes, and tenant, and one coparcener purchase the tenancy, this is not onely a partition of the mesnalty, being extinct for a third part, but a division of the feignory paramount, for now he must make severall avowries (1).

[k] 36. H. 6. 7.
(Post. 192. a.)

[l] If one coparcener make a feoffment in fee of her part, this is a severance of the coparcenarie, and severall writs of *procepe* shall lie against the other coparcener and the feoffee (2).

[l] 37. H. 6. 8.
43. E. 3. 1.

[m] If two coparceners be, and each of them taketh husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law.

[m] 17. E. 3. 14
15.

[n] If two coparceners be, and one disseise the other, and the disseisee bringeth an assise, and recover, it hath beene said, that she shall have judgement to hold her moiety in severalty. And this seemeth (say they) verie ancient, and thereupon vouch *Bracton*, * *si res fuerit communis locum habere poterit communi dividendo judicium*. And [o] so (say they) if the one coparcener recover against another in a *nuper obiit*, or a *rationabili parte*, the judgement shall be, that the demandant shall recover and hold in severalty. But *Britton* is to the contrary; for he saith, * *et si ascun des parceners soit enget ou disturbe de la seisin per ses auters parceners, un, ou plusors, al disseisee viendra assise per severall pleint sur les parceners et recoversa, mes nemy a tener en severaltie, mes en common solonque ced que avant le fist, &c.* [p] And this seemeth reasonable; for he must have this judgement according to his plaint, and that was of a moiety, and not of any thing in severaltie, and the sherife cannot have any warrant to make any partition in severalty or by metes and bounds.

[n] 12. E. 3.
Judgm. 162.
7. Ass. 10.
7. E. 3. 49.
10. Ass. 17.
12. Ass. 5. 17.
10. E. 3. 40. 43.
28. Ass. 35.
23. Ass. 18.
20. E. 3. Ass. 62.
3. E. 3. 48. b.
19. H. 6. 45.
7. H. 6. 4.
3. E. 4. 10.
* Bract. lib. 4.
fo. 216. b.
[o] 3. E. 3. 48.
21. R. 2. tit.
nuper ob. 22.
4. H. 7. 10.
30. E. 1. nuper
13. Morrice's

ob 18. F. N. B. 9. b.
case accorde. (Post. 187. a.)

* Britton fol. 112. a.

[p] 6. Co. 12, &

(3) See the case of a moveable fee simple, stated ant. fol. 4. a.

[167. b.]

(1) [See Note 15.]

(2) [See Note 16.]

Sect. 248.

ET quant judgment sera done sur tiel brief, le judgment serra tiel; que partition serra fait enter les parties, et que le vicount en son proper person alera a les terres et tenements, &c. et que il per le serement de xii loyals homes de son bayliwicke, &c. serra partition enter les parties, et que l'un part de mesmes les terres et tenements foyent assignes al plaintiff ou a l'un des plaintiffs, et un autre part a un autre parcener, &c. nient feasant mention en le judgement de l'eigne soer plus que de puisne.

AND when judgement shall be given upon this writ, the judgement shall be thus; that partition shall be made betweene the parties, and that the sherife in his proper person shall go to the lands and tenements, &c. and that he by the oath of 12 lawful men of his bailiwicke, &c. shall make partition between the parties, and that one part of the lands & tenements shall be assigned to the plaintiff or to one of the plaintiffs, and another part to another parcener, &c. not making mention in the judgement of the eldest sister more than of the youngest.

Bract. fo. 66, &c.
Brit. 71, &c.
Brit. ca. 72.
Fleta lib. 5. ca. 9.

NOTE, the first judgement in a writ of partition, whereof Littleton here speaketh, is, *quod partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis*, after which judgement. By this &c. viz. *tenements*, &c. is implied, that a writ shall be awarded to the sherife, *quod assumptis tecum 12 liberis et legalibus hominibus de vicineto tuo, per quos rei veritas melius sciri poterit, in propria persona tuâ accedas ad tenementa prædicta cum pertinentibus, et ibidem per eorum sacramentum, in præsentia partium (3) prædictarum per te præmuniendarum si interesse voluerint, prædicta tenementa cum pertinentibus per sacramentum bonorum et legalium hominum prædictorum, habito respectu ad verum valorem earundem, in duas partes æquales parti et dividi, et unam partem partium illarum, &c.*

Ockam ca. quid sit liber judicarius. (4)

40. E. 3. 45.
9. Aff. 2.
2. Aff. 35.
49. E. 3. 2.
Regist.
F. N. B. 16.

This last &c. in this Section is evident.

“Judgement,” *Judicium est quasi juris dictum*, so called, because so long as it stands in force *pro veritate accipitur* (1) and cannot be contradicted. And thereupon antiquitie called that excellent booke in the exchequer, *Domesday, Dies judicii*. *Sicut enim districti et terribilis examinis illa novissima sententia nullâ tergiversationis arte valet eludi, &c. sic sententia ejusdem libri inficiari non potest, vel impunè declinari; ob hoc nos eundem librum judicarium nominamus, &c. quod ab eo sicut a prædicto judicio non licet ullâ ratione discedere.* By Littleton it appeareth, that the formes of judgements, pleas, and other legall proceedings, doe conduce much to the right understanding of the law and of the reason thereof; as here Littleton rightly collecteth upon the forme of the judgement, that the sherife shall deliver to them such parts as he thinkes good, and that the eldest coparcener shall have no election when partition is made by the sherife. And it is to bee observed, that there bee two judgement

[168. a.]

(3) [See Note 17.]

[168. a.]

(4) See Dialog. de Scaccar. lib. 1. cap. 16. which hath the same title.

(1) See same explanation of *judicium*, ant. 39. a.

ments in a writ of partition. Of the former *Littleton* speaketh in this place. And when partition is made by the oath of twelve men, and assignement and allotment thereof, and so returned by the sherife, then the latter judgment is, *ideo consideratum est, quod partitio prædicta firma et stabilis imperpetuum teneatur*, and this is the principall judgement. [9] And of the other, before this be given, no writ of error doth lie. (2)

“*Shireve*” is a word compounded of two Saxon words, viz. *shire*, and *reve*. *Shire*, *satrapia*, or *comitatus*, commeth of the Saxon verbe *shiram*, i. e. *partiri*, for that the whole realme is parted and divided into shires; and *reve* is *præfectus*, or *præpositus*; so as *shireve* is the *reve* of the shire, *præfectus satrapie*, *provincie*, or *comitatus*. And he is called *præfectus*, because he is the chiefe officer to the king within the shire; for the words of his patent be, *commisimus vobis custodiam comitatus nostri de E.* And he hath a threefold custodie, *triplicem custodiam*, viz. First, *vite justitie*; for no suit begins, and no proceſſe is served but by the sherife. Also he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vite legis*; hee is, after long suits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vite reipublice*; he is *principalis conservator pacis*, within the countie, (3) which is the life of the common wealth, *vita reipublice pax*.

He is called before, Sect. 234. *viscount*, in Latyne, *vicecomes*, i. e. *vice comitis*, that is, in stead of the earle of that countie, who in antient time had the regiment of the countie under the king. For it is said in the *Mirror*,* that it appeareth by the ordinance of antient kings before the Conquest, that the earles of the counties had the custodie or gard of the counties, and when the earles left their custodies or gards, then was the custodie of counties committed to viscounts, who therefore (as it hath beene sayd) are called *vicecomites*. And Ockam cap. *quid centuria*, &c. *porro vicecomes dicitur, quod vicem comitis suppleat*.

Marcus saith, this office is *judiciaria dignitas*; *Lampridius*, that it is *officium dignitatis*. *Fortescue* saith, *quod vicecomes est nobilis officarius*. And see there, and observe well his honourable and solemne election and creation at this day. But to confirme all that hath beene said touching this point, and to conclude the same, among the lawes of Edward the Confessor (4) I finde it thus recorded. *Verum quod modo vocatur comitatus olim apud Britones temporibus Romanorum in regno isto Britannie vocabatur consulatus et qui modo vocantur vicecomites tunc temporis vice-consules vocabantur; ille vero dicebatur viceconsul, qui consule absente ipsius vices supplebat in jure et in foro*. (5) Herein many things are worthy of observation. First, for the antiquitie of counties. Secondly, that which wee called *comitatum*, the Romanes more latinely called *consulatum*. Thirdly, whom the Saxons afterwards called (as hath beene said) *shireve* or *earle*, the Romanes called *consul*. Fourthly, that the sherife was deputy of the consull or earle; and therefore the Romanes called him *viceconsul*, as we at this day call him *vicecomes*.

Fifthly,

[9] 11. Co. 40. Hill. 39. Eliz. Rot. 327. in Banke le Roy inter An. Countes de War. & le Seignior Berkley. (Fortesc. 52. Ant. 50. a. 109. b.)

Vide the Second Part of the Institutes. W. 1. c. 10.

* Mirror cap. 1. sect. 3.

Ockam cap. Quid Centur. &c

Fortescue cap. 24. 12. R. 2. cap.

Lambert fol. 129. 12.

(2) [See Note 18.]

(3) See Lamb. Just. ed. of 1602. p. 12, 13. and 2. Inst. 174. in both of which

books the coroner is so styled.

(4) [See Note 19.]

(5) [See Note 20.]

Cæsar Polichro.
Huntingdon.
Polidor. inter
leges Melmucii.
Hooker lib. 2.

Fiftly, that the sherife in the Romanes time, and before, was a minister to the king's courts of law and justice, and had then a court of his owne, which was the county court, then called *curia consularis*, as appeareth by these words, *ipsius vices supplebat in jure et in foro*. Sixtly, that this realme was divided into shires and counties, and those shires into cities, burroughes, and townes, by the Brittaines: so that king *Ælfred's* division of shires and counties was but a renovation or more exact description of the same. (6) Lastly, the consequence that will follow upon these things being so ancient, (as in the time of, and before the Romanes) the studious reader will easily collect. And afterwards, fol. 135. amongst the lawes of the same king it appeareth, that those whom the Saxons sometimes called (and now we call) *ældermen* or *eorles*, the Romanes called *senatores*, et *similiter olim apud Britones temporibus Romanorum in regno isto Britannicæ vocabantur senatores, qui postea temporibus Saxonum vocabantur aldermani, non propter ætatem, sed propter sapientiam et dignitatem, cum quidam adolescentes essent, jurisperiti tamen et super hoc experti.* (7)

“*De son Bayli-wicke.*” It appeareth before, that the enquest must be *de vicineto* of the place where the lands doe lie, and not generally *de baliwâ tuâ*. By this it appeareth, that the sherife is *baliwus*, and his county called *baliwa*; and therefore it is good to be seene what *baliwus* originally signified, and whereof it is derived. [168. b.]

Flet. lib. 2. cap.
67.
(Cro. Jam. 178.
Plowd. 28. b.
1. Ro. Abr. 339.)
Bract. lib. 3.
tract. 2. cap. 33.
nu. 3. Idem lib.
3. fo. 121. b.

Baylife (1) is a French word, and signifies an officer concerned in the administration of justice of a certaine province; and because a sherife hath an office concerning the administration of justice within his county or bailiwick, therefore he called his county *baliwa sua*. For example, when he cannot find the defendant, &c. he returneth, *non est inventus in baliwâ meâ*.

Bract. li. 3. 156.
b. Brit. fo. 56.
Flet. li. 2. ca. 63.
(10. Co. 103.
Post. 195. a.)

I have heard great question made, what the true exposition of this word *baliwus* is. In the statute of *Magna Charta*, cap. 28. the letter of that statute is, *nullus baliwus de cætero ponat aliquem ad legem manifestam nec ad juramentum simplici loquelâ suâ sine testibus fidelibus ad hoc inductis*. And some have said, that *baliwus* in this statute signifieth any judge; for the law must be waged and made before the judge. And this statute (say they) extends to the courts of common pleas, king's bench, &c. for they must bring with them *fideles testes*, &c. and so hath beene the usage to this day.

Glanv. li. 1. ca. 9.

But I have perused a very ancient and learned reading upon this statute; and the reader taketh it, that, at the common law before this statute, he, that would make his law in any court of record, must bring with him *fideles testes*. And this opinion herein is warranted by *Glanvil*, who wrote in the reigne of *Henry the second*. But the reader holdeth, that in the courts which were not of record, (2) as the county court, the hundred court, the court baron, &c. there the defendant without any faithfull witnesses might before this stat. have made his law, for remedy whereof this act was made; and therefore (saith he) the statute extendeth to the judges of such courts as are not of record. In 10. H. 4. it is holden,

10. H. 4. 4.
(Cro. Jam. 551.
584)

(6) [See Note 21.]

(7) [See Note 22.]

additional references in the margin on the side of the word *bailiff* relate to *bailiffs of manors*.

(2) Concerning the distinction of courts of record, see ant. 117. b.

[168. b.]

(1) See ant. 61. b. at the bottom. The

den, that if a lord, that hath a franchise in a leet, doth not enquire of things enquirable, and punish them, the sherife shall enquire in his turne, *et si le vicount ne faire en son torne, le baylis le roy enquirer' quant il vient, ou autrement serra inquisse per justice en eire*, where baylie le roy is understood justice le roy. And in the *Mirror* * it is holden, that the statute doth extend to everie justice, minister of the king, steward, &c. and all comprehended under this word *baylife*.

* *Mirr.* ca. 5.
sect. 2. Vi.
Bract. fo. 409.
Flet. li. 2. ca.
63. 56.

The chiefe magistrates in divers antient corporations are called baylifs, as in Ipswich, Yarmouth, Colchester, &c. And *baylife* in French is *diacetes*, *nomarcha*, in English, a bailife or governor. But of this thus much shall suffice.

Sect. 249.

*E*T de la partition que le vicount ad issint fait, il serra notice as justices (3) south son seale et les seales de chescun de les 12, &c. Et issint en ceo case poies veier, que l'eigne soer n'avera my la primer elecion, (4) mes le vicount luy assignera sa part que il avera, &c. Et poit estre que le vicount doit assigner primerment un part a le plus puisne, &c. et darreinement a l'eigne, &c.

AND of the partition which the sherife hath so made, he shall give notice to the justices under his seale, and the seales of every of the 12, &c. And so in this case you may see, that the eldest sister shal not have the first election, but the sherife shall assigne to her her part which shee shal have, &c. And it may be that the sherife will assigne first one part to the youngest, &c. and last to the eldest, &c.

“*SOUTH son seale, &c.*” Note, the partition, made and delivered by the sherife and jurors ought to bee returned into the court under the seale of the sherife, and the seales of the twelve jurors; for the words of the judicial writ of partition, which doth command the sherife to make partition, are *assumptis tecum 12 &c.* (so as there must be twelve) *et partitionem inde, &c. scir' facias justiciariis, &c. sub sigillo tuo, et sigillis eorum per quorum sacramentum partitionem illam feceris, &c.* And this is the reason, wherefore in this case the partition, which they make upon oath ought to be returned under their seales: and the reason of that is for the more strengthening of the partition by the 12, and that the sherife should not returne what partition he would. Now after all this, this (&c.) viz. 12, &c. doth imply, that the principall judgement upon the partition so returned is, *ideo consideratum est per curiam quod partitionis firma et stabilis imperpetuum teneatur.* (1) The latter two (&c.) are evident. (2)

Brit. fo. 185. b.
acc. *Bract.* l. 2.
fo. 71, &c. *Flet.*
l. 5. ca. 9.

Lib. 11. fol. 40.
in Metcalf's
case.

(3) In L. and M. and in Roh. there is an &c. here.

(4) An &c. here in L. and M. and in Roh.

[169. a.]

(1) See acc. ant. 168. a.

(2) [See Note 23.]

Sect. 250.

ET nota, que partition per agreement perenter parceners poit estre fait per la ley enter eux, auxibien per parol sans fait, come per fait.

AND note, that partition by agreement betweene parceners may bee made by law betweene them, as well by paroll without deed, as by deed. (3)

[r] 3. E. 4. 9, 10.
9. E. 4. 38.

11. H. 4. 3.

9. H. 4. partition

12. 21. E. 3. 38.

(Dy. 350. b. Post.

187. a. 198. b.)

[s] Vide Sect.

290. 3. H. 4. 1.

19. H. 6. 25.

28. H. 6. 2.

3. E. 4. 9, 10.

47. E. 3. 22.

47. Aff. 8.

19. H. 6. 1.

17. E. 3. 46.

30. Aff. 8. lib. 4.

fo 73 lib. 6.

fo. 12, 13.

2. H. 7. 5. Dier

18. Eliz. 358.

31. H. 8. Dier 46.

2. Eliz. Dier 179.

28. H. 8. Dier

29. 1. Mar.

Dier 98.

(1. Leon. 103.

HERE it appeareth, that [r] not onely lands and other things that may passe by livery without deed, but things also that do lie in grant, as rents commons advowsons and the like that cannot passe by grant without deed, whether they bee in one county or in severall counties, may be parted and divided by paroll without deed. [s] But a partition betweene joyntenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the statutes of 31. H. 8. cap. 10. and 32. H. 8. cap. 32. because they must pursue that act by writ *de partitione faciendâ*; and a partition betweene joyntenants without writ remains at the common law, which could not be done by paroll. And so it is and for the same reason of tenants in common. But if two tenants in common be, and they make partition by paroll, and execute the same in severall by livery, this is good, and sufficient in law. And therefore where bookes say, the joyntenants made partition without deed, it must be intended of tenants in common and executed by liverie.

Nota, betweene joyntenants there is a two-fold privity, viz. in estate and in possession: betweene tenants in common, there is privity onely in possession, and not in estate: but parceners have a threefold privity, viz. in estate, in person, and in possession.

(1. Leon. 103. 6. Co. 12. 8. Co. 42. Post. 186. a. 193. b. 200. b. 535 a. 2. Inst. 403.)

Sect. 251.

ITEM, si deux meases descendent a deux parceners, et l'un mease vault per an 20 s. l'auter forsque 10 s. per an, en cest cas partition poit estre fait enter eux en tiel forme; c'est a sçavoir, que un parcener avera l'un mease, et que l'auter parcener avera l'auter mease; et celui qui avera le mease qui est de value de 20 s. et ses heires payeront un annual rent de v. s. issuant hors de mesme le mease a l'auter parcener et a ses heires a tous jours. par ceo que chescun de eux auroit ewel'y en value.

AL SO, if two meases descend to two parceners, and the one mease is worth twenty shillings per annum, and the other but ten shillings per annum, in this case partition may bee made betweene them in this manner; to wit, the one parcener to have the one mease, and the other parcener the other mease; and she which hath the mease worth 20 shillings per annum and her heires shal pay a yeerely rent of five shillings issuing out of the same mease to the other parcener and to her heires for ever, because each of them should have equality in value.

(3) [See Note 24.]

Sect.

Sect. 252.

ET tiel partition fait per parol est assés bone; et mesme le parcener, que avra le rent, et ses heires, purront distreiner de comunen droit pur le rent en le dit mease de le value de 20 s si le rent de 5 s. soit aderere en ascun temps, en quecunque mains que mesme le mease deviendra, coment que ne fuit unques ascun escripture de ceo fait enter eux de tiel rent.

AND such partition made by paroll is good enough; and that parcener, who shall have the rent, & his heires, may distrein of common right for the rent in the sayd mease worth twenty shillings, if the rent of 5 shillings be behinde at any time, in whose hands soever the same mease shall come, although there never were any writing of this made betweene them for such a rent.

“**P**ER parol.” Nota, here [1] a rent may be granted for owelty of partition without (4) deed, even as a rent in case of a lease for years, for life, or a gift in taile, may bee reserved, without deed; and so may a rent be assigned to a woman out of the land, whereof shee is dowable, &c. without deed. But albeit an exchange for lands in the same countv may be without deed; yet a rent granted for equality (5) of the same exchange cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and compellable to make partition.

[1] 8. E. 3. 16.
21. Aff. p. 1.
21. E. 3. 38.
11. H. 4. 61.
45. E. 3. 21.
2. H. 6. 14.
21. H. 6. 11.
1. Mar. Dier 91.
(Ant. 34. b.)
(Mo. 29.)

“**L**e rent, &c.”

[169. b.] The same law is of common of estovers, or a corodie, or a common of pasture, &c. or a way granted upon the partition by the one coparcener to the other. All which and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

“**I**ssuant hors de mesme le mease, &c.” [x] For if it be granted out of other lands, then descended to the coparceners, then there must be a deed. [z] But if the rent be granted generally (out of no land in certaine) for owelty of partition, *pro residuo terræ*, it shall bee intended out of the purpartie of her that granteth it.

[x] 1. Mariz
Dyer 91.
[z] 29. Aff. 23.
29. E. 3. 9. b.
Pl. Com. 34.
(Post. 252. b.)

[a] If there be three coparceners, and they make partition, and one of them grant twenty shillings *per annum* out of her part to her two sisters and their heires for equality of partition, the grantees are not joyntenants of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moiety of the rent shall descend to her issue in course of coparcenary, and not survive to the other, for that the rent doth come in recompence of the land, and therefore shall ensue the nature thereof; and if the grant had beene made to them two of a rent of twenty shillings, viz. to the one ten shillings, and to the other ten shillings, yet shall they have the rent in course of coparcenary, and joyne in action for the same.

[a] 15. H. 7. 14.
29. Aff. 23.
29. E. 3. 9. b.
(5. Co. 8. a.
Wyndham's
case. 3. Co. 22. b.
Hob. 172.
Post. 177. b.)

IF

(4) [See Note 25.]

(5) Of equality in exchanges, see ant. 50. b. 51. a. & b.

Lib. 3. Cap. 1. Of Parceners. Sect. 253, 254.

[b] 29. Aff. 23.
29. E. 3. 9.
17. E. 3. 10.

[b] If one coparcener be married, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the fem covert, this partition being equall shall charge the part of the fem covert for ever.

[c] 38. E. 3.
26. b.

[c] If two coparceners by deed indented alien both their parts to another in fee, rendring to them two and their heires a rent out of the land, they are not joyntenants of this rent, but they shall have the rent in course of coparcenary; because their right in the land, out of which the rent is reserved, was in coparcenary.

[d] 1. Mariae
Dyergl. 8. E. 3.
16. and other
the bookes
abovesaid.

“*Purront distreiner de common droit, &c.*” That is, [d] in this case the law doth give a distresse, lest the grantee should bee without remedy, for the which upon the partition she hath given a valuable recompence in land, which descended, &c. And so in the case of dower abovementioned. (1)

Sect. 253.

EN mesme le maner est de tous maners de terres et tenements, &c. lou tiel rent est reserve a un ou a divers parceners sur tiel partition, &c. Mes tiel rent n'est pas rent service, mes est rent charge de common droit (1) ewe et reserve pur egalite de partition (2).

IN the same manner it is of all manner of lands and tenements, &c. where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent service, but a rent charge of common right had and reserved for equality of partition.

“*TERRRES et tenements, &c.*” Here (&c.) implyeth a caution, viz. that they be such lands and tenements out of [170. a.] which a rent for egalite of partition may be granted, whereof sufficient hath beene said before.

“*Reserve al un.*” Here reservation is taken for a grant; and if it be used upon the partition, doth amount in this case to a grant, which is worthy the observation.

Sect. 254.

ET nota, que nuelles sont appellees parceners per le common ley, mes females ou les heires de females, que veignent a terres et tenements per descent: car si soers purchase terres ou tenements, de ceo ils sont appellees joyntenants, et nemy parceners.

AND note, that none are called parceners by the common-law, but females or the heires of females, which come to lands or tenements by descent: for if sisters purchase lands or tenements, of this they are called joyntenants, and not parceners.

This needs no explanation.

(1) See ant. 34. b. 153. a. and Sheph. Comm. Assur. 425.

[170. a.]

(1) See ant. 153. a. note 1.

(2) In L. and M. &c. here.

Sect. 255.

I T E M, si deux parceners de terres en fee simple font partition enter eux, et la part de un vault plus que le part de l'auter, si els fueront al temps de la partition de pleine age, scil. de 21 ans, donques la partition tous dits demurrera, et ne sera unques defeat. Mes si les tenements (dont els font partition) soyent a eux en fee taile, et le part que l'un ad est melieux en annuall value que est la part le l'auter, coment que els sont concludes durant leur vies a defeater la partition; uncore si le parcener, que ad le meinder part en value, ad issue et devy, l'issue poit disgreer a la partition, et enter et occupier en common l'auter part que fuit allotte a sa aunt, et issint l'auter poit enter et occupier en common l'auter part allotte a sa soer, &c. si come nul partition ust este fait. (1)†

A L S O if two parceners of land in fee simple make partition between themselves, and the part of the one valueth more then the part of the other, if they were at the time of the partition of full age, *sc.* of 21 yeares, then the partition shall alway remaine, and be never defeated. But if the tenements (whereof they make partition) be to them in fee taile, and the part of the one is better in yearly value then the part of the other, albeit they be concluded during their lives to defeat the partition; yet if the parcener, which hath the lesser part in value, hath issue and dye, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister, &c. as if no partition had beene made.

“ D O N Q U E S le partition tous dits demurrera, &c.” Hereby it appeareth, that the inequality of the value shall not impeach a partition made of lands in fee simple betweene coparceners of full age, (3) no more then it shall doe in case of an exchange. (4)

9. H. 6. 5. and other the bookes above said.

“ Ils sont concludes durant leur vies.” This inequall partition doth so conclude the parceners themselves, as shee that hath the unequall part shall not avoid it during her life.

“ Concludes.” This word is derived of *con* and *claudo*, (5) and (Post. 352. a.) in this sense signifieth to close or shut up her mouth that she cannot speake to the contrary.

[170. b.] Husband and wife tenants in speciall taile of certaine lands in fee have issue a daughter, the wife dyeth, the husband by a second wife hath issue another daughter, both the daughters enter (where the eldest is only inheritable) and make partition: the eldest daughter is concluded during her life to impeach the partition, or to say that the youngest is not heire, and yet she is a stranger to the taile, but in respect of privity in their persons the partition shall conclude, 11. Aff. p. 2. See after the chapter of Garr. (2) (Doctor & Stud. 65.)

(3) Ant. acc. 166. a.

(4) Ant. 51. a.

(5) Acc. ant. 37. a.

[170. b.]

(1)† [See Note 26.]

(2) See the case of discontinuance stated by lord Coke post. 373. b.

clude, for a partition between meere strangers in that case is voyd, but the issue of the eldest shall avoid this partition as issue in taile.

[g] 21. E. 3. 34.

35. 2. E. 2.

Bastardy 19.

11. Aff. 23.

30. Aff. 7.

17. E. 3. 59.

[g] T. S. seised of lands in fee hath issue two daughters, Rose and Anne, bastards eigne and mulier puisne, and dieth. Rose and Anne doe enter and make partition. (3) Anne and her heires are concluded for ever. (4)

(8. Co. 101. b. Post. 244 b.)

Sect. 256.

ITEM, si deux parceners de tene-
ments en fee preignent barons, et ils
et leur barons font partition enter eux,
si la part l'un est meinder en annual
value que la part l'auter, durant les
vies leur barons la partition estoyera en
sa force. Mes coment que il estoyera
durant les vies les barons, uncore apres
la mort le baron, celui femme, que ad le
meinder part, poit enter en la part sa
soer come est avantdit, et defeatera la
partition.

AL SO, if two parceners of lands
in fee take husbands, and they
and their husbands make partition
betweene them, if the part of the one
bee lesse in value then the part of the
other, during the lives of their hus-
bands the partition shall stand in its
force. But albeit it shal stand during
the lives of their husbands, yet after
the death of the husband, that woman
which hath the lesser part may enter
into her sisters part as is aforesaid, and
shall defeat the partition.

EL S et leur barons." Here it appeareth, that the wife must
be party to the partition, and so are the bookes * to bee
intended that speake of this matter.

* 42. Aff. 22.

8. E. 4. 4.

9. E. 3. 38.

15. E. 4. 20.

F. N. B. 62.

29. Aff. 23.

9. H. 6. 5.

43. Aff. 14.

[b] Vid. 2. E. 2.

Cui in vita 17.

"Et defeatera la partition." Note, the partition shall not be
defeated for the surplussage onely to make the partition equall, but
here it appeareth that it shall bee avoyded for the whole. But of
this more shall be said hereafter in this chapter, *sectione 264.*

[b] And though the partition be unequall, yet is not the partition
voyd, but voydable; for if after the decease of the husband, the
wife entereth into the unequall part, and agreeth thereunto, this
shall binde, and therefore Littleton used the word (defeatera,) which
proveth it to bee voydable. [171. a.]

Sect. 257.

MES si le partition fait perenter
les barons (1) fuit tiel, que chef-
cun part al temps d'allotment fait fuit
de egall annuall value, donque il ne poit
apres estre defeat en tielx cases.

BUT if the partition made be-
tweene the husbands were thus,
that each part at the time of the allot-
ment made was of equall yearely va-
lue, then it cannot afterwards be de-
feated in such cases.

"PERENTER

(3) [See Note 27.]

(4) [See Note 28.]

[171. a.]

(1) Instead of les barons it is eux in L.
and M. and Roh.

“*PERENTER les barons.*” This is mistaken, for the originall is *parenter eux*, that is, betweene the barons and fems, and not as it is here betweene the barons, therefore this error would be hereafter reformed.

“*Al temps del allotment.*” Hereby it appeareth, that if the parts at the time of the partition bee of equall yearely value, neither the wives nor their heyres shall ever avoyd the same; and the reason hereof is, for that the husbands and wives were compellable by law to make partition, and that which they are compellable to doe in this case by law, they may doe by agreement without processe of (2) law. If the annuall value of the land be equall at the time of the partition, and after become unequall by any matter subsequent, as by surrounding, ill husbandry, or such like, yet the partition remains good.

9. H. 6. 5. and
other the bookes
abovesaid.
(Post, 179.)

*Judicis officium est, ut res ita tempora rerum
Querere; quæsito tempore tutius eris.*

But if the partition be made by force of the king's writ, and judgement thereof given, it shall binde the fem-coverts for ever, albeit the parts be not of equall annuall value; because it is made by the sherife by the oath of twelve men by authority of law; and the judgement is, that partition shall remaine firme and stable for ever, as hath beene said. [a] But a partition in the chancery where one coparcener is of full age and sueth livery, and one other is within age and hath an unequall part allotted to her, this shall not binde her at full age; for in a writ directed to the escheator to make partition, there is a *salvo jure*, and there is no judgement upon such a partition. But if such a partition be equall, it shall binde, so that a part of the land holden *in capite* bee allotted to every of the coparceners, for so that end there is an expresse *proviso* in the writ. [b] And this partition may be avoyded either by *scire fac* in the chancery, or by a writ *de partitione faciendâ* at the common law at her full age (3).

[a] F. N. B.
256, 259, 260,
261, 262, 263.
9. H. 6. 6.
21. E. 3. 31.

[b] Vide
21. E. 3. 31.

Sect. 258.

ITEM, si deux parceners sont, et le puisne estant deins l'age de 12 ans, et partition est fait enter eux, issint que la purpartie que est allot al puisne est de meindre value que la purpartie l'auter, en cest case le puisne, durant le temps de son nonage, et auxy quaut el vient a pleine age, scil. de 21 ans, poit enter en la purpartie a sa soer allot, et defeatera la partition. Mes bien soy gard tiel parcener quant el vient a sa plein age, que el ne preigne a son use demesne tous les profits des terres ou tenements

AL SO, if two coparceners be, and the yongest being within the age of twenty-one years, partition is made betweene them, so as the part which is allotted to the yongest is of lesse value than the part of the other, in this case the yongest, during the time of her nonage, and also when shee commeth to full age, *scil.* of 21 yeares, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to her full age, that

(2) [See Note 29.]

(3) Acc. F. N. B. 62. H,

nements que a luy furent allots; car donques el soy agreea a le partition a tiel age, en quel casè la partition estoyera et demurra en sa force. Mes peraventure les profits de la moitie el poit prendre, r l'inquisant les profits de l'auter moitie a ja soer. (1)
 take the profits of the moitie, leaving the profits of the other moitie to her sister.

that shee taketh not to her owne use all the profits of the lands or tenements which were allotted unto her; for then shee agrees to the partition at such age, in which case the partition shall stand and remaine in its force. But peradventure she may

[c] 43. Aff. 14.
 9. H. 6. 5, 6.
 7. E. 3. 13.
 8. E. 3. 24.
 10. H. 4. 5.
 31. Aff. 16.
 21. H. 6. 25.
 (1. Ro. Abr.
 138. Hob. 179.)

AS before in the case of the fem-covert, [c] so it is in the case of the infant; for if the partition be equall at the time of the allotment, it shall binde him for ever, because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendâ*; (2) and though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry; for if he take the whole profits of the unequal part, after his full age, the partition is made good for ever. And therefore *Littleton* here giveth him a caveat, that in that case he take not the whole profits of his unequal part, neither shall an unequal partition in the chancery binde an infant, as appeareth before. (3) But a partition made by the king's writ *de partitione faciendâ* by the sherife by the oath of twelve men, and judgement thereupon given, shall binde the infant, though his part be unequal, *causâ quâ supra*.

[171.b.]

Sect. 259.

ET est ascavoir, que quant il est dit, que males ou females sont de pleine age, ceo serra entendue d'age de 21 ans; car si devant tiel age ascun fait ou feoffement, grant, release, confirmation, obligation, ou auter scripture, soit fait per ascun de eux, &c. ou si ascun deins tiel age soit baylife ou recevoir a ascun home, &c. tout serve pur nient, et poit estre avcyde. Auxy home devant le dit age ne serra my jure en un enquest, &c. (1)†.

AND it is to be understood, that when it is said, that males or females bee of full age, this shall be intended of the age of 21 yeares; for if before such age any deed or feoffement, grant, release, confirmation, obligation, or other writing, bee made by any of them, &c. or if any within such age bee baylife or receiver to any man, &c. all serve for nothing, and may be avoided. Also a man before the sayd age shall not be sworne in an enquest, &c.

THE law hath provided for the safety of a man's or woman's estate, that * before their age of twentie one yeares they cannot binde themselves by any deed, (4) or alien any land (5), goods, or chattels (6).
 * Vid. Sect. 402, 403.
 a. Inst. 673.
 F. N. B. 192. g.
 Post. 246. i. 337. b. 350. a. & b. 380. a. Ant. 171. a. 8. Co. 44. b.)

" Age

(1) In L. and M. and Roh. an &c. here.

(2) [See Note 30.]

(3) See the case of partition of an advowson between coparceners, where one is within age, in F. N. B. 36. D.

(4) See ant. 51. b. note 2. and 52. a.

note 2. To the references there add 3. P. Wms. 208.

(5) [See Note 31.]

(6) [See Note 32.]

(1)† No &c. in L. and M. nor Roh.

"*Age de 21 ans.*" Before this age a man or woman is called an enfant.

"*Fait,*" *Factum*, *Anglicè* a deed, and signifieth in the common law, an instrument consisting of three things, viz. writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the civilians *literarum obligatio*.

Brit. fo. 65, 66.
& 101.

Flet. li. 3. ca. 14.
(Perk. sect. 135)

[172. a.] "*Feoffment.*" Of this word sufficient hath bin sayd before in the first chapter of the first booke.

"*Grant,*" *Concessio*, is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like. Of this also sufficient likewise hath beene said in the first chapter of the first booke.

Lib. 3. fol. 63.
in Lincolne Colledge case.

"*Release, confirmation, &c.*" Of these shall bee spoken hereafter in their proper places and chapters.

"*Obligation*" is a word of his owne nature of a large extent; but it is commonly taken in the common law, for a bond containing a penalty, with condition for payment of money or to do or suffer some act or thing, &c. and a bill is most commonly taken for a single bond without condition.

"*Ou auter scripture soit fait per ascun de eux, &c.*" Here by this &c. is implied some exceptions out of this generality, [*d*] as an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards: but if he bind himselfe in an obligation or other writing with a penalty (2) for the payment of any of these, that obligation shall not bind him. [*e*] Also other things of necessity shall bind [him], as a presentation to a benefice, (3) for otherwise the laps shall incurre against him. Also if an infant be an executor upon payment of any debt due to the testator, hee may make an acquittance; but in that case a release without payment is voyd (4): and generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. (5) But of this common learning this little tast shall suffice.

104, 105. (5. Co. 29. b. 27. a. 6. Co. 3. Cro. Cha. 324. 590. 502. Mo. 105. 1. Sid. 41. 259. 446.)

[*d*] 18. E. 4. 2.

21. H. 6. 3.

lib. 9. fol. 87.

Pinchon's case.

(2. Ro. Abr.

146. Cro. Eliz.

920. 2. Inst. 483.

Cro. Cha. 179.

Cro. Jam. 494.

560. 1. Ro. Abr.

729. Plowd.

364.)

[*e*] 8. E. 4. 4.

9. H. 6. 5.

17. E. 3. 9.

29. Aff. 25.

2. Mariae Dyer

Cro. Jam. 320.

"*Baylife ou receiver al ascun home, &c.*" By this &c. many things are implied, as that by baylife is understood a servant that hath administration and charge of lands goods and chattels to make the best benefit for the owner against whom an action of account doth lie for the profits which he hath raised or made or might by

Fleta lib. 2. ca.

64. & ca. 67.

Britton fol. 62.

70. Fleta lib. 2.

cap. 64.

41. E. 3. 39.

46. E. 3.

account 40.

(2) [See Note 33.]

(3) See acc. ant. 89. a. and note 1. there.

(4) Acc. post. 264. b.

(5) See F. N. B. 168. d. and the notes b. &c. in the 4to. edition as to infant's binding himself to serve.

2. R. 2. *ibid.* 45. his industry or care have reasonably raised or made, his reasonable charges and expences deducted. [f] But one under the age of twenty one yeares shall not be charged in any such account; (6) because, by intendment of law, before his full age hee hath not skill and ability to raise or make any such improvement and profit.

6. R. 2. *ibid.*
3. E. 3. 10.
(Cro. Jam. 177.
1. Leon. 219.)
[f] 13. E. 3.
infant 9. 17. E. 2.
account 121.
21. E. 3. 8. 10. H. 4. 14. 2. H. 4. 13. regist. 135. (Finch L. 302, 303. Noy. 12.)

An account against a receiver is, when one receiveth money to the use of another to render an account: but upon his account he shall not be allowed his expences and charges. [g] And therefore a man cannot charge a baylife as a receiver; because then the baylife should lose his expences and charges.

In an account against a receiver, the plaintife must declare by whose hands the defendant received the money, which he shall not doe in the case of a baylife. [h] But in some case in an action of account against one as *receptor denariorum*, he shall have allowance of his expences and charges, and also shall account for the profit he received (7) or might reasonably receive; and this was provided by law in favour of merchants, and for advancement of trade and trafficke.

As if two joynt merchants occupy their stocke goods and merchandizes in common to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenient sicut per legem mercatoriam rationabiliter monstrare poterit.*

[i] If there be two joyntenants or tenants in common of lands, and the one make the other his baylife of his moiety, he shall have an action of account against him as bailife: and so are the bookes to be intended, that speake of an action of account in that case. (8)

So as there be but three kinds of writs of account, viz. against one as gardian, whereof *Littleton* hath spoken before in the Chapter of Socage; the second against one as baylife; and the third as receiver; as here it appeareth. (k) For a man shall not bee charged in an account as surveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there must be, either a privity (9) in deed by the consent of the partie, for [l] against a disseisor or other wrongdoer no account doth lie; or a privity in law *ex provisione legis* made by the law, as against a gardian, &c. whereof sufficient hath been spoken in the Chapter of Socage. (10)

[l] 2. Mar. B. account 89. F. N. B. 117. Pl. Com. 542.
2. H. 4. 12. 33. H. 6. 2. 4. H. 7. 6, &c. (F. N. B. 119 c.)

“*Ne ferra jure en un enquest, &c.*” By this &c. is implied a maxime in law, [m] *quod minor jurare non potest.* For example [n] an infant cannot make his law of *non summons*; [o] and therefore the default shall not grieve him; for seeing the meane to excuse the default is taken away by law, the default it selfe shall not prejudice

(6) See acc. ant. 88. b.

(7) See Dy. 21 b.

(8) [See Note 34.]

(9) See as to this and the king's prero-

gative in charging persons as accountants the earl of Devonshire's case 11. Co. 89. a.

(10) Ant. 90. b.

prejudice him. But yet this rule hath an exception, that [p] an infant, when he is of the age of 12 yeares, shall take the oath of allegiance to the king (1) : and this was, as *Bracton* saith, *secundum leges sancti Edwardi* ; but indeed such was the law in the time of king *Arthur*. (2) [q] An infant cannot upon his oath make his law in an action of debt. [r] And the husband and wife of full age, for the debt of the wife before the coverture, shall make their law.

1. H. 7. 25. 15. E. 4. 24. (Post. 295.)
21. H. 3. 23. (Post. 295. a. Cro. Eliz. 161.)

[r] 46. E. 3. 10. 9. E. 4. 24. 15. E. 4. 2.

[p] Vid. devant
cap. de Homage
et cap. de Fealty,
Sect. 85. 91.
Bract. li. 2. fo.
124. Britton
fo. 73, 74. et
fol. 19. Fleta
lib. 1. cap. 27.
[q] 11. H. 40.

Sect. 260.

ITEM, si terres ou tenements soyent dones a un home en le taile, quel ad tant des terres en fee simple, et ad issue deux files et devie, et ses deux files font partition enter eux, issint que la terre en fee simple est allot a la file puisne en allowance des terres et (3) tenements tailes allottes a la file eigne, si, apres tiel partition fait, la puisne file alienast sa terre en fee simple a un auter en fee, et ad issue firs ou file et devie, l'issue poit bien entrer en les tenements tailes et eux tener et occuper en purpartie ovesque son aunt. Et ceo est pur deux causes. Un est, pur ceo que l'issue ne poit aver ascun remedie de la terre alien per sa mere, pur ceo que la terre fuit a luy en fee simple ; et pur tant que il est un de les heires en taile, et n'ad my ascun recompence de ces que a luy affiert de les tenements tailes, il est reason, que el eit sa purparty de les tenements tailes, et noymement quant tiel partition ne fait ascun discontinuance (1)†.

Mes le contrary est tenus M. 10. H. 6. scil. que le heire ne poit enter sur le parcener que ad la terre taile, mes est mis a formedon.

H. 6. scil. that the heire may not enter upon the parcener who hath the intailed land, but is put to a formedon.

AL S O, if lands or tenements be given to a man in taile, who hath as much land in fee simple, and hath issue two daughters and die, and his two daughters make partition betweene them, so as the land in fee-simple is allotted to the younger daughter in allowance for the lands and tenements in taile allotted to the elder daughter, if, after such partition made, the younger daughter alieneth her land in fee simple to another in fee, & hath issue a son or daughter and dies, the issue may enter into the lands in taile and hold and occupy them in purparty with her aunt. And this is for two causes. One is, for that the issue can have no remedie for the land sold by the mother, because the land was to her in fee simple ; and in as much as she is one of the heires in taile, & hath no recompence of that which belongeth to her of the lands in taile, it is reason that she hath her portion of the lands tailed, and namely when such partition doth not make any discontinuance.

But the contrary is holden M. 10.

“ L A

(1) [See Note 35.]

(2) See notes 3. and 4. of fol. 63. b.

(3) In L. and M. instead of *terres & it is autres*.

(1)† In L. and M. Rob. and the two Cambridge MSS. these words are added, *de le taile, si come sera dit en apres en le chapitre de discontinuance*. What follows in this Section is not in L. and M. Rob. nor the MSS.

(4. Co. 121. b.) (Ant. 51. a.) “ *La terre en fee simple est allot a la fille puisne.*” It is first to be observed upon this whole case, that the fee simple land is allotted to the yongest daughter, and the land entailed to the eldest. This partition *primâ facie* is good; (4) and herein the partition differeth from the exchange, where in the exchange the estates must be equal.

But yet this partition by matter subsequent may become voidable (as *Littleton* here puts the case). The eldest coparcener hath by the partition and the matter subsequent barred herself of her right in the fee simple lands, inasmuch as when the yongest sister alieneth the fee simple lands and dieth, and her issue entreth into halfe the lands entailed, yet shall not the eldest enter into halfe of the lands in fee simple upon the alienee: for by the alienation, the privitie of the state is destroyed.

(Post. 174. b.) [173. a.] “ *Le puisne fille alien la terre en fee simple, &c.*” The same law it is, if the yongest daughter had made a gift in tayle, for the reversion expectant upon an estate tayle is of no account in law (2), for that it may bee cut off by the tenant in tayle. Otherwise it is of an estate for life or yeares. If in this case the yongest daughter alien part of the land in fee simple, and dieth, so as a full recompence for the land entailed descends not to her issue, she may waive the taking of any profits thereof and enter into the land entailed; for the issue in taile shall never be barred without a full recompence, though there be a warranty (3) in deed or in law descended. If on the other side the eldest coparcener alien the land entayled and dyeth, her issue shall have a *formedon* alone (4) for the whole land entailed; for so long as the partition continueth in force (5), she is only enheritable to the whole land entailed.

“ *Et n’ad my ascun recompence.*” This is intended, as it appeareth, of a full recompence.

See more of this in the Chapter of Discontinuance, Sectione .

“ *Tiel partition ne fait ascun discontinuance.*” And the reason thereof is, for that it passeth not by livery of seisin, but the partition is in truth lesse then a grant, for that it maketh no degree, but each coparcener is in by descent from the common ancestor.

20. H. 6. 14. “ *Mes le contrary est tenuis, &c.*” This is no part of *Littleton*, and is contrary to law, as appeareth by *Littleton* himselfe; and besides, the case intended is not truly vouched, for it is not in 10. H. 6. but in 20. H. 6. and yet there is but the opinion of *Newton*, obiter, by the way. *Vide F. tit. part 1.*

(4) [See Note 36.]

[173. a.]

(2) For the effect of this doctrine about reversions on estates tail, and with what qualification it should be understood, see the

authorities collected in 1. Vin. Abr. 141. pl. 2. to which add 2. Atk. 206. and post. 174. b.

(3) [See Note 37.]

(4) [See Note 38.]

(5) See post. 176, b. and Sect. 274.

Sect. 261.

UN autre cause est, pur ceo que il serra rette la folly del eigne seer, que el voit suffer ou agree a tiel partition, ou el puiſſoit aver si el voile la moitie de la terre en fee simple et son moitie des terres en le taile pur sa purparty, et issint estre sure sans dammage.

ANOTHER reason is, for that it shall be accounted the folly of the eldest sister, that she would suffer or agree to such a partition, where she might if shee would have had the moity of the land in fee simple and a moity of lands entailed for her part, and so to be sure without losse.

“*UN autre cause, &c.*” This is another reason to prove, that by the partition the eldest daughter hath concluded her selfe, as is aforeſaid.

“*Son moitie des terres en le taile.*” For if a writ of partition had beene brought, the eldest should not have beene compelled to take the whole estate in taile, for the prejudice that might after ensue, but might have challenged the one moity of the lands in taile, and another moity of the lands in fee simple, and this she might doe *ex provisione legis*. But when she will not submit her to the policie and provision of the law, but betake herselfe to her owne policy and provision, there the law will not ayde her, as here by *Littleton* it manifestly appeareth. And so it is in the other case. (*) As if a man be seised of three mannors of equal value in fee, and taketh wife, and chargeth one of the mannors with a rent charge, and dyeth, she may by the provision of the law take a third part of all the mannors and hold them discharged; but if she will accept the entire mannor charged, it is holden that she shall hold it charged.

(*) 26. E. 3.
dower 133.
17. E. 2. tit.
dower 164.
18. H. 6. 27.
(Ant. 32. b.
33. a.)

73. b.] A partition of lands intailed betweene parceners, if it be equall at the time of the partition, shall bind the issues in taile for ever (1), albeit the one doe alien her part.

Dyer 1. Mar. 98.

But here it may be demanded, that seeing *Littleton* saith, that it shall be taken to be the folly of the eldest parcener, &c. what if so be the eldest did not know of the estate taile either in respect of the antiquity thereof, or for want of having of the evidence, or for any other cause, what folly can be imputed to her?

The answer is, that it is presumed in law, that every one is conscious of her right and title to her owne land; and on the other side it should be arrested (2) great folly in her to bee ignorant of her owne title. And therefore the reason of *Littleton* doth firmly hold.

(1) Acc. ant. 166. a. 2. Vern. 233.

(2) [See Note 39.]

Sect. 262.

AUXY, si home soit seise en fee d'un carve de terre per just title, et disseisist un enfant deins age d'un autre carve, et ad issue deux filles, et morust seisi d'ambideux carves, l'enfant adonque esteant deins age, et les filles entrent et font partition, issint que l'un carve est allotte al purparty l'un, come per case al puisne en allowance d'auter carve que est allotte a le purparty de l'auter, si puis l'enfant enter en le carve dont il fuit disseisist sur la possession le parcener que ad mesme le carve, donques mesme le parcener poit entrer en l'auter carve que sa soer ad, et tener en parcenary ovesque luy. Mes si le puisne aliena mesme la carve a un autre en fee simple devant l'entree l'enfant, et puis l'enfant enter sur le possession l'alienee, donque el ne poit enter en l'auter carve; pur ceo que per son alienation el ad luy tout ousterment dismis de aver aucun part de les tenements come parcener. Mes si le puisne devant l'entree l'enfant fait de ceo un lease pur terme d'ans, ou pur terme de vie, ou en fee taylorie savant la reversion a luy, et puis l'enfant enter, la peradventure autrement est; pur ceo que el ne soy dismis de tout ceo que fuit en luy, mes ad reserve a luy le reversion et le fee, &c.

enter, there peradventure otherwise it is; because she hath not dismissed her selfe of all which was in her, but hath reserved to her the reversion and the fee, &c.

AL S O, if a man bee seised in fee of a carve of land by just title, and hee disseise an infant within age of another carve, and hath issue two daughters, and dyeth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as per case to the youngest in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof hee was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the youngest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed her self to have any parte of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for terme of yeares, or for terme of life, or in fee taylorie laying the reversion to her, and after the infant

BEFORE (3) it appeareth that when the privity of the estate is destroyed by the feoffment of one coparcener, that upon eviction of a moiety by force of an entayle against the other she shall not enter upon the alienee. But in this case that *Littleton* here putteth, when the privity of the state remaineth, and the part of the one is evicted, (*) she shall enter and hold in coparcenary with her other coparcener; and so it is in the case of an exchange. By reason of the &c. in the end of this Section there may two questions be justly demanded.

What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition avoyded,

(*) 15. E. 4. 3. a. per Littleton. lib. 4. fo. 121, 122. Bastard's case.

avoyded, for that *Littleton* here putteth the case that the whole purpartie of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in taile, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty bee evicted, that shall avoyd the partition in the whole, bee it of a mannor, that is entire, or of acres of ground, or the like, that bee severall; [n] for the partition in that case implyeth for this purpose both a warrantie and a condition in law (4), and either of them is entire, and giveth an entry in this case into the whole. And so hath it beene lately resolved [o] both in the case of exchange and of the partition.

[n] 13. E. 4. 3.
42. Aff. 22.

[o] Bastard's
case lib. 4. fol:
121.

To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoyded in the whole. (1) As if *A.* bee seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and hee disseise the lessee for life who makes continuall clayme; *A.* dyeth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter: the partition is avoided for the whole, and so likewise hath [p] it beene lately resolved.

[p] Bastard's
case, ubi supra;

[q] Yet there is a diversity betweene the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law, (2) she defeateth the partition in the whole. But when shee voucheth by force of the warranty in law for part, the partition shall not bee defeated in the whole, but shee shall recover recompence for that part. And therein also there is another diversity betweene a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange he shall recover a full recompence for all that he loseth. But upon the partition she shall recover but the moiety, or halfe of that which is lost, to the end that the losse may be equall. (3)

[q] Vide 5. E. 3.
tit. Voucher 249.

(6. Co. 12. b.
1. Ro. Abr. 815.
4. Co. 122.)

Many other diversities there be between exchanges and partitions; for there are more and greater privities in case of partitions in persons bloud and estates, than there is in exchanges; all which were too tedious to rehearse in this place, seeing so much as hath beene said herein is sufficient for the explanation of the cases of partition which *Littleton* hath put.

18. E. 2. tit.
Aid 171.
19. H. 6. 26.
(Ant. 50. b.)

“*Donques el ne poct enter en l'auter carve, &c.*” By this is also approved that which hath beene often said before, that when the whole privity betweene coparceners is destroyed, there ceaseth any recompence to be expected either upon the condition in law or warranty in law by force of the partition.

“*Per*

(4) That is, a condition to give re-entry and a warranty to vouch and have recompence. See post. 384. a.

(2) That is, *by entry*.

(3) See acc. the case of dower post. 384. b. See also the provision in favour of the lord for the third part not devisable by the statute of wills 34. and 35. H. 8. c. 5. f. 11.

[174. a.]

(1) [See Note 40.]

(Post. 243. b.)

“*Per son alienation el ad luy tout ousterment dismise d’aver ascun part de les tenements comz parcener.*” Hereupon it followeth, that if one parcener maketh a feoffment in fee, and after her feoffee is impleaded and voucheth the feoffor, [r] she may have aid of her coparcener to deraigne a warranty paramount, (4) but never to recover *pro rata* against her by force of the warranty in law upon the partition; for Littleton here saith, that by her alienation she hath dismissed her selfe to have any part of the land as parcener, and without question as parcener she must recover *pro rata*, upon the warranty in law, against the other parcener.

[r] 41. E. 3. 24.
11. H. 4. 22, 23.
14. E. 3. Aid 24.
(Hob. 21. 26.)

[a] 43. E. 3. 23.
Pl. Com.

4. E. 3. 15.

5. E. 3. 7.

38. E. 3. 17, &c.

[b] 32. E. 1. tit.
Aid 178.

3. E. 2. ibid. 163.
(Post. 384. b.)

And yet in some case the feoffee of one coparcener shall have aid of the other parceners to deraigne the warranty paramount. And therefore [a] if there be two coparceners, and they make partition, and the one of them enfeoffes her sonne and heire apparent and dieth, the sonne is impleaded, albeit he be in by the feoffment of his mother, yet shall he pray in ayd of the other coparcener to have the warranty paramount; and the reason [b] of the granting of this aid is, for that the warranty betweene the mother and the sonne is by law adnullled, (1) and therefore the law giveth the sonne albeit he be in by feoffment, to pray in ayd of the other parcener, to deraigne the warranty paramount; wherein is to bee observed the great equity of the common law in this case;

[174. b.]

Ipse etenim leges cupiunt ut jure regantur.

[*] 2. H. 6. 16.
(Plowd 9. b.
Mansel's case.)

[*] But if a man be seised of lands in fee, and hath issue two daughters, and make a gift in taile to one of them, and dye seised of the reversion in fee which descends to both sisters, and the donee or her issue is impleaded, she shall not pray in ayd of the other coparcener, either to recover *pro rata* or to deraigne the warranty paramount; for that the other sister is a stranger to the state taile, whereof the eldest was sole tenant, and never partition was or could be thereof made. (2)

(Ant. 173 a.)

“*Mes si le puisne devant l'entree l'enfant fait de cco un lease, &c. ou en fee taile savant le reversion a luy, &c.*” This (upon that which hath beene said) (3) needeth no explanation. Only this is to be observed, that, albeit it is in the power of tenant in taile to cut off the reversion, yet if the infant enter before it be cut off, the law hath such consideration of this reversion, that she that loseth it shall enter into her sister's part, and hold with her in coparcenary, for that the privity betweene them was not wholly destroyed. (4)

(4) See 31. H. 3. c. 1. f. 3. 4. H. 7. 3. a.
and Plowd. Mansel's case 7. a. & b.

(2) See post. 177. b. *contra* as to land given in frankmarriage. See also 2. H. 6. 16.

[174. b.]

(1) Acc. post. 390. a.

(3) Ant. 173. a. and note 2. there.

(4) See ant. 103. a. & b.

Sect. 263.

(F. N. B. 162. c.)

ITEM, si soient trois ou quater parceners, &c. que font partition enter eux, si le part d'un parcener soit defeat per tiel loyal entrie, et poit enter et occuper les auters terres ovesque tous les auters parceners, et eux compeller de faire novel partition de les auters terres enter eux, &c.

AL S O, if there be three or foure coparceners, &c. which make partition betweene them, if the part of the one parcener be defeated by such lawfull entrie, she may enter and occupie the other lands with all the other parceners, and compell them to make new partition betweene them of the other lands, &c.

“**I**NTER eux, &c.” This &c. implieth, that so it is betweene the surviving parceners and the heires of the other, or betweene the heires of parceners, all being dead.

Sect. 264.

ITEM, si sont deux parceners, et l'un prent baron, et le baron et sa feme ont issue enter eux, et la feme devy, et le baron soy tient eyns en le moity come tenant per le curtesie, en cœo cas le parcener que survesquist et le tenant per le curtesie bien poient faire partition enter eux, &c. Et si le tenant per le curtesie ne voit agreer al partition d'estre fait, donques le parcener que survesquest poit aver envers le tenant per le curtesie brieſe de partitione faciendâ, &c. et luy compeller de faire partition. Mes si le tenant per le curtesie voile aver partition enter eux d'estre fait, et le parcener que survesquist ne voit cœo aver, donque le tenant per le curtesie n'avera ascun remedy pur aver partition, &c. Car il ne poit aver brieſe de partitione faciendâ, pur cœo que il n'est parcener. Car tiel brieſe giſt pur parceners tantſolement. Et iſſint poyes veyer, que brieſe de partitione faciendâ giſt envers tenant per le curtesie, et uncore il meſne ne poit aver tiel brieſe.

tenant by the curtesie, and yet he himſelfe cannot have the like writ.

AL S O, if there bee two parceners, and the one taketh husband, and the husband and wife have issue betweene them, and his wife dieth, and the husband keepes himſelfe in as tenant by the curtesie, in this caſe the parcener which ſurviveth, and the tenant by the curtesie may well make partition between them, &c. And if the tenant by the curtesie will not agree to make partition, then the parcener which ſurviveth may have againſt the tenant by the curtesie a writ de partitione faciendâ, &c. and compel him to make partition. But if the tenant by the curtesie would have partition to be made between them, and the parcener which ſurviveth will not have this, then the tenant by the curtesie cannot have any remedy to have partition, &c. For hee cannot have a writ of partitione faciendâ, becauſe he is no parcener. For ſuch a writ lyeth for parceners only. And ſo you may ſee, that a writ of partitione faciendâ lyeth againſt

“*Le baron soy tient eins come tenant pur le curtesie.*” This is no severance of the state in coparcenary, [b] for the other coparcener and the tenant by the curtesie shall be joyntly impleaded; for he doth continue the state of coparcenary, as the other parcener did. (5)

[b] 24. E. 3. 29.
31. E. 3.
Briefe 339.
9. E. 4. 13.
19. H. 6. 26.
3. H. 6. 26.
3. H. 6. Aff. 1.
37. H. 6. 8.
21. E. 3. 14.
(Ant. 167. b.)
[c] 3. E. 3. 47.
9. E. 5. 13.
16. E. 3. Aid. 129.

“*Vers le tenant per le curtesie brief de partitione faciendā, &c.*” Here by the &c. is implied, that albeit that the tenant by the curtesie be an estranger in blood, yet the [c] writ *de partitione faciendā* clearly lies against the tenant by the curtesie, because he continueth the estate of coparcenary.

If two coparceners be, and one doth alien in fee, they are tenants in common, and severall writs of *præcipe* must be brought against them; (1) and yet the parcener shal have a writ of partition against the alienee at the common law, which is a far stronger case then the case put of tenant by the curtesie.

“*Tiel briefe gift pur parceners tantselement.*” Hereby it appeareth, that neither the tenant by the curtesie, nor (much lesse) the alienee of a coparcener shall have a writ of *partitione faciendā* at the common law; (2) for *Littleton* saith here, that such a writ lyeth onely for parceners, [*] but it may be brought by a parcener against strangers, as it appeareth before. But a *nuper obiit* and a *rationabili parte* (3) doe lye onely betweene two coparceners on both sides.

[*] 3. E. 3. 47.
48.
(F. N. B. 197.
Plowd. 306. b.)

Dier 1. Mariae
98.

F. N. B. 52.
Registr.

If three coparceners be, and the eldest doth purchase the part of the youngest, the eldest, having one part by descent and the other by purchase, shall have a writ of partition at the common law against the other middle sister, *et sic de similibus.* And so it is in a far stronger case, if there be three coparceners, and the eldest taketh husband, and the husband purchase the part of the youngest, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in the right of his wife who is a parcener. (4)

[d] 31. H. 8.
cap. 1. 32. H. 8.
cap. 32. Vid.
Sect. 290.

[*] Rot. Parl.
1. R. 2. nu. 82.

[e] Brooke tit.
partition 41.

“*Pur aver partition, &c.*” Here by this &c. is included all others that be strangers in blood, whether they come to their estates by purchase or by act in law. Since *Littleton* wrote, by the statutes [d] one joyntenant or tenant in common may have a writ of partition against the other; and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common: and the like had beene attempted in former parliaments [*], but prevailed not untill these latter statutes.

[e] The tenant by the curtesie shall have a writ of partition upon the statute of 32. H. 8. ca. 37. for albeit he is neither jointenant nor tenant in common, for that a *præcipe* lyeth against the parcener and

[175. b.]

(5) Acc. post. 175. b. See also fo. 192. a. and Bro. Joinder in action 40.

Post. 192. a.

(2) See acc. Dy. 98. b.

(3) See ant. 164. b.

(4) See in F. N. B. 62. S. the form of

the writ in such a case.

[175. a.]

(1) Acc. ant. 167. b. But it is no severance, if the alienation be only for life.

and tenant by the curtesie, as hath been said, yet he is in equall mischiefe as another tenant for life.

[f] If there be three coparceners and a stranger purchase the part of one of them, he and one other of the coparceners shall not joyne in a writ of partition, neither by the common law, nor by force of the statute; for the words of the preamble of the statute be (*and none of them by the law doth or may know their severall parts, &c. and cannot by the laws of this realme make partition thereof, without other of their mutuall assents, &c.*) Now in this case the one of the plaintifes, viz. the parcener, may have a writ of partition at the common law, and the other parcener being a purchaser may have it by the statute; and therefore they shall not joyne in one writ.

[f] Mich. 7. & 8 Eliz. Bendloes inter Wotton & Cooke. (1) Dier 3. Mariae 128. A. & 7. Eliz. 243.

(1) S. C. is also in Dy. 260. b.

PARCENERS per le custome sont, lou home seisie en fee simple, ou en fee taile, de terres ou tenements que sont de tenure appel gavelkind deins le county de Kent, et ad issue divers fits et devie, tielx terres ou tenements descenderont a tous les fits per le custome, et ovelment enheriteront et feront partition enter eux per le custome, sicome females feront, et brieve de partitione faciendâ gift en ceo cas, sicome enter females. Mes il covient en la declaration de faire mention de le custome. Auxy tiel custome est en auters lieux d'Engleterre. Et auxi tiel custome est en North Gales, &c. (2)

PARCENERS by the custome are, where a man seised in fee simple, or in fee taile, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath issue divers sonnes and die, such lands or tenements shall descend to all the sons by the custome, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custome. Also such custome is in other places of England, and also such custome is in North-Wales, (3) &c.

(1. Sid. 136.

Ant. 140. a.)

See before all the ancient authors of the law concerning gavelkind ubi supra. Lambert verbo. Terra exscript.

[g] 5. E. 4. 8. b.

21. E. 4. 56. b.

Plo. Com. 129. b.

in Buckleis case.

Vide Sect. 8.

versus finem.

(1. Sid. 138.

Doctr. Plac.

105.)

[b] Berochescire.

H. reford.

[i] Lamb. verb.

Weissmen Sil-

vester Giraldus.

“**M**ES il covient en le declaration de faire mention de la custome.”

Well said Littleton, [g] that he in his declaration must make mention of the custome, as to say, that the land is of the custome of gavelkinde; but hee shall not prescribe in it. And so is it of *Burgh English*. And these two vary in that point from other customes; for the law, when they are generally alledged, taketh knowledge of these two. (4)

In [b] *Domesday* it is thus said, *duo fratres tenuerunt in paragio* (5) *quisque habuit aulam suam, et potuerint ire quod voluerint.*

“*Auxy tiel custome est en auters lieux Angleterre.*” Of this sufficient hath beene said before. (6)

“*North Gales,*” Wales, *Wallia*. It commeth [i] of the Saxon word *wealþ*, which signifieth *peregrinus*, or *exterus*; for the Saxons so called them, because in troth they were strangers to them, being the remaine of the old and ancient Britons, a wise and warlike nation inhabiting in the west part of England. These men have kept their proper language for above these thousand yeares past; and they to this day call us Englishmen *Saxons* (that is) Saxons. And the like custome, as our author here saith was in North Wales, was also in Ireland; for there the lands also (which is one marke of the ancient Brittons) were of the nature of gavelkinde: but where by their

(2) In L. and M. and the two MSS. it is *en Northumberland et North Wales, &c.*

(3) [See Note 41.]

(4) [See Note 42.]

(5) [See Note 43.]

(6) Ant. 14. a. and 140. a. See also book 1. chap. 7. of Robinson on Gavelkind, where the reader will see a most learned dissertation on the origin antiquity and universality of partible descents.

[176. a.] their *Brèbon* law the bastards inherited with their legitimate sons, as to the bastards that custome was abolished. (1) And agreeing with Littleton in this point, see an old statute. * *Aliter usitatum est in Walliâ quàm in Angliâ, quoad successionem hæreditatis, eò quòd hæreditas partibilis est inter hæredes masculos, et à tempore cujus non extitit memoria partibilis extitit, dominus rex non vult, quòd consuetudo illa abrogetur, sed quòd hæreditates remaneant partibiles inter consimiles hæredes sicut fieri consuevit, et fiat partitio illius sicut fieri consuevit.* (2) Vide Sect. 212. * Stat. Walliæ, an. 12. E. 1.

“ *Parceners per le custome, &c.*” Well sayd Littleton, “ by the custome,” for sons are parceners in respect of the custome of the fee or inheritance, and not in respect of their persons, as daughters and sisters, &c. be. [b] *Et sunt participes quasi partem capientes, &c. ratione ipsius rei quæ partibilis est, et non ratione personarum, quæ non sunt quasi unus hæres et unum corpus, sed diversi hæredes, ubi tenementum partibile est inter plures cohæredes petentes, qui descendunt de eodem stipite et semper solent dividi ab antiquo.*

[b] Bract. l. 5. fo. 428. Brit. cap. 71. Flet. lib. 5. cap. 9.

Sect. 266.

ITEM, il y ad autre partition quel est d'auter nature et d'auter forme que ascuns des partitions avount dits sont. Sicome home seisie de certain terres en fee simple ad issue deux files, et l'eigne est mary, et le piere dona parcel de ses terres a le baron ove sa file en frankmariage, et morust seisis de le remnant, le quel remnant est de pluis greinder value per an que sont les terres dones en frankmariage.

AL S O, there is another partition which is of another nature and of another forme then any of the partitions aforesaid be. As if a man seised of certaine lands in fee simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frankemariage, and dyeth seised of the remnant, the which remnant is of a greater yearely value then the lands given in frankmariage.

“ **D**ONA parcel de ses terres a le baron ove sa file en frankmariage.”

Here it appeareth, that a gift in frankemariage may be made ater mariage, as hath beene sayd in the chapter of Fee Tayle. (3)

“ *Le quel remnant est de pluis greinder value per an, &c.*” Admit, that the lands given in frankmariage are of greater value than the lands descended in fee simple, shall the other sister have any remedy against the donees? It is plaine she shall not; because it is lawfull for a man to dispose of his own lands at his will and pleasure.

(1) [See Note 44.]

(2) See ant. 175. b. note 4.

(3) See ant. 21. b. See also acc. as to

dower *ex assensu patris* after marriage F. N. B. 151. L.

Sect. 267.

EN cel case, le baron, ne le feme, avera riens pur lour purpartie de le dit remnant, sinon que ils voient mitter lour terres dones en frankmariage en hotchpot ovesque le remnant de la terre ovesque sa soer. Et si issint ils ne voient fayre, donques le puisne poet tener et occuper meme le remnande, et prendra a luy les profits tantselement. Et il semble, que cest parol (hotchpot) est en English a pudding; car en tiel pudding n'est communement mise un chose tantselement, mes un chose ovesque autres choses ensemble. Et pur ceo il covient en tiel case de mitter les terres dones en frankmariage ovesque les autres terres en hotchpot, si le baron et sa feme voient aver aucun part en les autres terres.

IN this case, neither the husband, nor wife, shall have any thing for their purpartie of the said remnant, unless they will put their lands given in frankmariage in *hotchpot*, with the remnant of the land with her sister. And if they will not doe so, then the youngest may hold and occupie the same remnant, and take the profits onely to her selfe. And it seemeth, that this word (*hotchpot*) is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in frankmariage with the other lands in *hotchpot*, if the husband and wife will have any part in the other lands.

[i] 8. H. 3.
breve 880.
34. E. 1. nuper
obijt 15. adjudge
4. E. 3. 49.
10. Aff. p. 14.
Vi. 10. E. 3.
38. & 30. Aff. 7.
Bracton lib. 2.
fol. 77. lib. 5.
fol. 428. Brit.
ca. 72. Fleta
lib. 6. cap. 47.

“ **E**N cel case, le baron, ne le feme, avera riens pur lour purpartie, &c.” [i] This gift in frankmariage shall *primâ facie* be intended a sufficient advancement; and therefore the remnant shall descend to the other coparcener, onely with this provision in law *tacite* annexed, that if the donees will put the land into *hotchpot*, then she shall out of the remnant make up her part equall. But the donees must doe the first act, and in the meane time the whole fee simple land descends to the other. And this is warranted here by *Littleton*, viz. that the donees shall have nothing for the purpartie of the remnant, unlesse they will put their lands given in frankmariage in *hotchpot* so as the donees must doe the first act; and more expressly after in this Chapter, (1) where he directly saith, that the other sister shall enter into the remnant, and them to occupy to her owne use, unlesse the husband and wife will put the lands given in frankmariage into *hotchpot*. And herewith agreeth *Fleta*, (2) who saith, *cum dicat tenens excipiendo, quod non tenetur petenti respondere, quia A. participem habet, &c. replicari poterit à petente quod prædict' A. tenet quandam partem in maritagium de communi hereditate, nec vult illud in partem ponere*. And here are three things (that I may speake once for all) to be observed. First, that in this speciall case where there be two daughters, one of them onely shall inherit the lands in fee simple. Secondly, that in this case there lieth no writ of partition: because *non tenent in simul et pro indiviso*. Thirdly, if the parcener, to whom the land in fee simple descended, will not put the lands in *hotchpot*, then may the donees enter into the fee simple lands, and hold them in coparcenarie with her.

[176. b.]

And

(1) See Sect. 268.

(2) See also acc. F. N. B. 197. O.

And it seemeth by our old bookes, [k] that by the ancient law there was a kind of resemblance hereof concerning goods. *Si autem post debita deducta, et post deductionem expensarum quæ necessariae erunt, id totum, quod tunc superfuerit, dividatur in tres partes; quarum una pars relinquatur pueris (3) si pueros habuerit defunctus, secunda uxori si superstes fuerit, et de tertiâ parte habeat testator liberam disponendi facultatem. Si autem liberos non habeat, tunc medietas defuncto, et alia medietas uxori: si autem sine uxore decefferit liberis existentibus, tunc medietas defuncto, et alia medietas liberis tribuatur: si autem sine uxore et liberis, tunc id totum defuncto remanebit.* And by the law before the Conquest it * was thus provided, *sive quis incuriâ sive morte repentinâ fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito, verum eas judicio suo uxori liberis et cognatione proximis justè pro suo cuique jure distribuito.*

But it appeareth by the Register [l] and many of our bookes, that there must be a custome alledged in some county, &c. (5) to inable the wife or children (5)† to the writ *de rationabili parte bonorum*; (6) and so hath it beene resolved in parliament. [m] But such children, as be reasonably advanced by the father in his life time with any part of his goods, shall have no further part of his goods; for the words of the writ be, *nec in vitâ patris promoti fuerunt.* (7)

Note, the custom of London is, that if the father advance any of his children with any part of his goods, that shall bar them to demand any further part, unlesse the father under his hand or in his last will do expresse and declare, that it was but in part of advancement, (8) and then that child so partly advanced shall put his part in *hotchpot* with the executors and widow, (9) and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in effect, which the civilians call *collatio bonorum.* (10)

[k] Glanvil. lib. 7. cap. 5. Bracton lib. 2. fol. 60. Fleta lib. 2. cap. 5. (4) Magna Carta cap. 18. 3. F. N. B. 222. 30. E. 3. 25. 31. E. 3. Resp. 60. 31. Aff. 14. 17. E. 2. Detinew 17. E. 3. 17. 1. E. 2. Detinew 56. 31. H. 8. tit. rationab. parte bonorum 6. * Lamb. f. 119. 68. (Post. 185. b. Ant. 149. b.) [l] Regist. 142. 34. E. 1. Detinew 60. 1. E. 4. 6. 7. E. 4. 21. 43. E. 3. 38. (F. N. B. 122. L.) [m] 3. E. 3. dette 156. 40. E. 3. 18.

[177. a.]

“ *Et il semble que cest parol (hotchpot) est en Engliſh a pudding, &c.*” Littleton both here and in other places searcheth for the signification of words, in all arts; a thing most necessary; for *ignoratis terminis ignoratur et ars. Vide for Etymologies, Sect 95. 119. 135. 154. 164. 204. 234 &c.*

Hotspot or *hotspot* is an old Saxon word, and signifieth so much as Littleton here speaks. And the French use *hotchpot* for a commixion of divers things together. It signifieth here metaphorically *in partem positio*. In English we use to say *bodgepodge*, in Latine *farrago* or *miscellaneum*.

The residue of this Section needeth no explication.

Fleta lib. 6. ca. 47. (1) Mich. 10. E. 1. coram-rege Hereford in thesaur.

Vide Brit. cap. 72. 4. E. 3. 49. 6. E. 3. 30. 10. E. 3. 38. 24. E. 3. 27. F. N. B. 262. Regist. 320.

(3) [See Note 45.]

(4) The chapter of Fleta is here referred to erroneously. It should be cap. 57.

(5) [See Note 46.]

(5)† [See Note 47.]

(6) [See Note 48.]

(7) [See Note 49.]

(8) [See Note 50.]

(9) [See Note 51.]

(10) [See Note 52.]

[177. a.]

(1) This reference to Fleta is wrong. It should be lib. 5. cap. 9. p. 314.

Sect. 268.

ET cest terme (*hotchpot*) n'est fors-
que un terme similitudinarie, et
est a tant a dire, c'estascavoir, de mit-
ter les terres en frankmarriage et les
autres terres en fee simple ensemble; et
ceo est a tiel entent de conuster le value
de tous les terres, scil. de les terres dones
en frankmarriage, et de le remnant que
ne fueront dones, et donques partition
serra fait en le forme que ensuist. Si-
come, mittomus que home soit seise de 30
acres de terre en fee simple, chescun acre
de value de 12 d. per an. et que il ad
issue deux files, et l'une est covert de ba-
ron, et le pier dona 10 acres de les 30
acres a le baron ove sa file en frankmar-
riage, et morust seise de le remnant,
donques l'auter soer entra en le remnant,
scil. en les 20 acres, et eux occupiera a
son use demesne, si non que le baron et sa
feme voille mitter les 10 acres dones en
frankmarriage ove les 20 acres en
hotchpot, c'estascavoir, ensemble; et
donque quant le value de chescun acre
est conus, c'estascavoir, que chescun acre
vault per an, et est assesse ou enter eux
agree, que chescun acre vault per an
12 d. donques le partition serra fait en
tiel forme, c'estascavoir, le baron et sa
feme averont oustre les 10 acres dones a
eux en frankmarriage 5 acres en seve-
raltie de les 20 acres, et l'auter soer
avera le remnant, scil. 15 acres de les
20 acres pur sa purpartie, issint que ac-
comptant les 10 acres que le baron et sa
feme ont per le done en frankmarriage,
et les autres 5 acres de les 20 acres, le
baron et sa feme ont autant en annual
value que l'auter soer ad.

acres which the baron and fem have by the gilt in frankmarriage, and the other
5 acres of the 20 acres, the husband and wife have as much in yearly value
as the other sifter.

AND this tearme (*hotchpot*) is
but a tearme similitudinary, and
is as much to say, as to put the lands
in frankmarriage and the other lands
in fee simple together; and this is
for this intent, to know the value
of all the lands, scil. of the lands
given in frankmarriage, and of the
remnant which were not given, and
then partition shall be made in form
following. As, put the case that
a man be seised of 30 acres of land
in fee simple, every acre of the
value of 12 pence by the yeare, and
that he hath issue two daughters, and
the one is covert baron, and the fa-
ther gives ten acres of the 30 acres to
the husband with his daughter in
frankmarriage, and dyeth seised of the
remnant, then the other sifter shall
enter into the remnant, viz. into the
20 acres, and shall occupie them to
her owne use, unlesse the husband and
his wife will put the 10 acres given
in frankmarriage with the 20 acres
in *hotchpot*, that is to say, together;
and then when the value of everie
acre is knowne, to wit, what every
acre valueth by the year, and it is as-
sessed or agreed between them, that
every acre is worth by the yeare 12
pence, then the partition shall be
made in this manner, viz. the husband
and wife shall have besides the 10 acres
given to them in frankmarriage 5 acres
in severaltie of the 20 acres, and the
other sifter shall have the remnant,
scil. 15 acres of the 20 acres for her
purpartie, so as accounting the 10
acres which the husband and wife have

[177. b.]

Pract. lib. 2.
fel. 70. lib. 5.
fel. 428. Brit.
cap. 72. and

AND herewith in expresse tearmes agreeth *Bracton*, *Britton*, and
Fleta, and all the bookes abovesaid and many others. And it
is worthy the obervation [u], that after this putting into *hotchpot*,

Fleta lib. 6. ca. 47. 4. E. 3. 49. 10. E. 3. 37.

[u] 10. E. 3. 37. 10. Aff. 14. 4. E. 3. 49.

and partition made, the lands given in frankmariage are become as the other lands which descended from the common ancestor, and of these lands if she be impleaded [o] she shall have aide of the other parcener as if the same lands had descended. (1) So the co-parcener that hath a rent granted to her for owelty of partition, as is aforesaid, hath the rent, as if it had descended to her from the common ancestor.

[o] 29. Aff. 23.
(Ant. 169. b.)

Sect. 269.

(Hob. 10.) (Ant. 23. 2.)

ET issint tous foits sur tiel partition les terres dones en frankmariage demurgent a les donees et a lour heires solonque le forme de le done: car si l'auter parcener averoit riens de ceo que est done en frankmariage, de ceo ensueroit enconvenience et chose encounter reason, que la ley ne voit suffer. Et la cause, pur que les terres dones en frankmariage serront mis en hotchpot, est ceo. Quant home done terres ou tenements en frankmariage ove sa file, ou ove auter cosin, il est entendus per la ley, que tiel done fait per tiel parol (frankmariage) est un avancement, et pur avancement de sa file, ou de son auter cosin, et n'osmement quant le doner et ses heyres n'averont ascun rent ne service de eux, sinon que soit fealty, tanque le quart degree soit passe, &c. Et pur tiel cause la ley est, que el avera riens de les auters terres ou tenements descendus a l'auter parcener, &c. sinon que el voille mitter les terres dones en frankmariage en hotchpot, come est dit. Et si el ne voille mitter les terres dones en frankmariage en hotchpot, donque el n'avera riens del remnant, pur ceo que serra entendu per la ley, que el est suffisamment avance, a que avancement el sey agree et luy tient content.

[178. a.]

AND so alwaies upon such partition the lands given in frankmariage remaine to the donees and to their heires according to the forme of the gift: for if the other parcener should have any of that which is given in frankmariage, of this would ensue an inconvenience and a thing against reason, which the law will not suffer. And the reason, why the lands given in frankmariage shal bee put in hotchpot, is this. When a man giveth lands or tenements in frankmariage with his daughter, or with his other cousin, it is intended by the law, that such gift made by this word (frankmariage) is an advancement, and for advancement of his daughter, or of his cousin, and namely when the donor and his heires shall have no rent nor service of them, but fealtie, untill the fourth degree be past (1). And for this cause the law is, that she shall have nothing of the other lands or tenements descended to the other parcener, &c. unlesse shee will put the lands given in frankmariage in hotchpot, as is said. And if she will not put the lands given in frankmariage in hotchpot, then she shall have nothing of the remnant, because it shall be intended by the law, that shee is sufficiently advanced, to which advancement shee agreeth and holds her selfe content.

(1) See ant. 174. b. contra as to gift in tail to a daughter not being in frankmariage.

[178. a.]

(1) See ant. 21. b.

Lib. 3. Cap. 2. Of Parceners by Custome. Sect. 270, 271.

“ *DE* ceo ensueroit enconvenience et chose encounter reason, que la ley ne voet suffer.”

Regula.

[o] Vid. Sect.

138, 139. 231.

440. 478. 488.

722.

[p] 40. Aff. 27.

(Ant. 23. b.)

Sect. 20.

Quod est inconueniens aut contra rationem non permissum est in lege. Hereby it appeareth, as it hath beene often noted, (o) that an argument *ab inconuenienti* aut *ab eo quod est contra rationem* is forcible in law. [p] *Nihil enim quod est inconueniens, est licitum.*

“ *Tanque le quart degree soit passe, &c.*” Here by &c. is implied how the degrees shall be accounted, whereof sufficient hath beene said before.

Sect. 270.

MESME la ley est perenter les beires de les donees en frankmariage et les auters parceners, &c. si les donees en frankmariage deviont devant leur auncester, ou devant tiel partition, &c. quant a mitter en hotchpot, &c.

THE same law is between the heirs of the donees in frankmariage, and the other parceners, &c. if the donees in frankmariage die before their ancestor, or before such partition, &c. as to put in hotchpot, &c.

BY these three &c. in this Section is implied, that if either the donees dye before the ancestor, or survive the ancestor and die before such a partition, or if the donees and all the parceners die before such partition upon the putting into hotchpot, their issues shall have the same benefit to put the lands into hotchpot; for that benefit is heritable, and descendible to the issues.

Sect. 271.

ET nota, que donees en frankmariage fueront per la common ley devant le statute de Westminster second, et tout temps puis ad este use et continue, &c.

AND note, that gifts in frankmariage were by the common law before the statute of Westminster second, and have beene alwaies since used and continued, &c.

“ *CONTINUE, &c.*” By this &c. is to be understood, that before the statute it was a fee simple, and since the statute a fee taile. So as it is true, that [q] the gifts doe continue (as our author here saith) but not the estates; for the estate is changed, as at large appeareth in the Chapter of Estates in Taile. And albeit our author here saith, that such gifts have beene alwaies since used and continued, yet now they be almost growne out of use, and serve now principally for moote cases and questions in law that thereupon were wont to rise.

[q] 12. H. 4. 11.

31. E. 3.

Gard. 116.

(Ant. 21. a.)

[178. b.]

Sect.

Sect. 272.

ITEM, tiel mitter en hotchpot, &c. est, lou les auters terres ou tenements que ne fueront dones en frankmariage descendent de les donors en frankmariage tantsolement; car si les terres descenderont a les files per le pier le donor, ou per le mere le donor, ou per le frere le donor ou auter ancestor, et nemy per le donor, &c. là auterment est; car en tiel cas el, a quel tiel done en frankmariage est fait, avera sa part, sicome multiel done en frankmarriage ust este fait, pur ceo que el ne fuit avance per eux, &c. eins per un auter, &c.

AL S O, such putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmariage descend from the donors in frankmariage only; for if the lands shall descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancestor, and not by the donor, &c. there it is otherwise; for in such case shee, to whom such gift in frankmariage is made, shall have her part, as if no gift in frankmariage had beene made, because that she was not advanced by them, &c. but by another, &c.

TH E lands given in frankmariage and the lands in fee simple must move from one and the same ancestor, for the lands given in frankmariage are in respect of the advancement accounted in law, as hath beene said (1), as if the same had descended from the same ancestor who died seised of the fee simple lands, and there is no reason to barre the donee of her full part of the fee simple lands that descended from another ancestor from whom shee had no such advancement.

“Nemy per le donor, &c.” Here &c. implieth no more but that donor that made the gift of frankmariage. The other two &c. in this Section need no explanation.

Sect. 273.

ITEM, si home seisie de 30 acres de terre chescun acre de ovel annual value, eiant issue deux files come est avantdit, et dona 15 acres de ceo a le baron ove sa file en frankmarriage, et morust seisie de les auters 15 acres, en cest case l'auter soer avra les 15 acres issint descendus a luy sole, et le baron et sa feme ne mitteront en tiel cas les 15 acres a eux dones en frankmarriage en hotchpot; pur ceo que les tenements dones en frankmarriage sont de auxy grand et de bone annual value comes les auters

AL S O, if a man be seised of 30 acres of land everie acre of equall annuall value, and have issue two daughters as aforesaid, and giveth 15 acres hereof to the husband with his daughter in frankmariage, and dies seised of the other 15 acres, in this case the other sister shall have the 15 acres so descended to her alone, and the husband and wife shall not in this case put the 15 acres given to them in frankmariage into hotchpot; because the tenements given in frankmariage are

(1) Ant. 177. b.

Lib. 3. Cap. 2. Of Parceners by Custome. Sect. 274.

autres terres descendus, &c. Car si les terres dones en frankmariage sont de tant egal annual value que le remnant sont, ou de plus value, en vaine et a nul entent tielx tenements dones en frankmariage serront mis en hotchpot, &c. pur ceo que el ne poit riens aver de les autres terres descendus, &c. car si el averoit ascun parcel de les tenements descendus, donques el avera plus de annual value que sa soer, &c. que la ley ne voit, &c. Et sicome est parle en les cases avantdits de deux filles ou de deux parceners; en mesme le maner est en semblable cas, lou sont plusors soers ou plusors parceners, selonque cco que le case et le matter est, &c.

are of as great and good yearly value as the other lands descended, &c. For if the lands given in frankmariage bee of equall or of more yearely value then the remnant, in vaine and to no purpose shall such tenements given in frankmariage bee put in hotchpot, &c. for that she cannot have any of the other lands descended, &c. for if shee should have any parcell of the lands descended, then she shall have more in yearly value then her sister, &c. which the law will not, &c. And as it is spoken in the cases aforesaid of two daughters or of two parceners; in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is, &c.

BY this Section and the &c. herein some have gathered, that the value of the lands shall be accounted as they were at the time of the gift in frankmariage. But it is clear, that the value shall bee accounted as it was at the time of the partition; for if the donor purchase more land after the gift, or if the land given in frankmariage be by the act of God decayed in value, or if the remnant of the lands in fee simple be improved after the gift, or *à converso*, the law shall adjudge of the value as it was at the time of the partition, (unlesse it bee by the proper act or default of the parties) as hath beene said before in the former Chapter. And some have collected upon this Section, that the reversion in fee of the lands given in frankmariage shall only descend to the donee; for otherwise the other sister shal have more benefit then the donee, which should bee against the reason of our author.

(Ant. 32. a.
171. a.)

Regula. Vid.
Sect. 194. 578.
ib. 5. fo. 89.

“ *In vaine et a nul entent, &c.*” For it is a maxime in law, *lex non præcipit inutilia, quia inutilis labor stultus.*

(Ant. 172. b.)

Sect. 274.

[179. b.]

ET est ascavoir, que terres ou tenements dones en frankmariage ne serra mise en hotchpot, forsque ou terres descendont en fee simple; car de terre descendus en fee taile partition serra fait, sicome nul tiel done en frankmariage ust este fait.

AND it is to be understood, that lands or tenements given in frankmariage shall not bee put in hotchpot, but where lands descend in fee simple; for of lands descended in fee taile partition shall be made, as if no such gift in frankemariage had beene made.

FOR

FOR of lands intailed the donee in frankmarriage shall have as much part as the other coparcener, because, over and besides the land given in frankmarriage, the issue in taile claimeth *per formam doni*, and both of the parceners must equally inherit by force of the gift, *et voluntas donatoris, &c. observetur.* 31. Aft. pl. 14.

Sect. 275.

ITEM, *nuls terres serra mise en hotchpot ove auters, sinon terres que fueront done en frankmarriage tantselement: car si ascun feme ad ascuns auters terres ou tenements per ascun auter done en le taylor, el ne unques mittera tiel terre issint done en hotchpot, mes el avera sa purpartie de le remnant descendus, &c. scilicet, a tant que l'auter parcener avera de le mesme remnant.*

AL S O, no lands shall bee put in *hotchpot* with other lands, but lands given in frankmarriage only: for if a woman have any other lands or tenements by any other gift in taile, she shal never put such lands so given in *hotchpot*, but she shal have her purparty of the remnant descended, &c. (*videlicet*) as much as the other parcener shall have of the same remnant.

FOR if the ancestor infeoffeth one of his daughters of part of his land, or purchase lands to him and her, and their heires, or giveth to her part of his lands in taile speciall or generall, she notwithstanding this shall have a full part in the remnant of the lands in fee simple; for the benefit of putting, &c. into *hotchpot* is onely appropriated to a gift in frankmarriage, (*quia maritagium cadit in partem*) which shall be (as is aforesaid) accounted as parcel of her advancement. 13 E. 2. tit. taile 26.
6 E. 3. 30. b.
4. H. 3. 49, 50.
Braet. li. 2. fo. 77.

Sect. 276.

ITEM, *un auter partition poet estre fait enter parceners, que variast de les partitions avantdits. Sicome y sont trois parceners, et le puisne voet aver partition, et les auters deux ne voillent, mes voilent tener en parcenarie ceo que a eux assiert sans partition, en ceste case, si un part soit alot en severalty al puisne soer, solonque ceo que el doit aver, donques les auters poient tener le remnant en parcenarie, et occuper en common sans partition, si els voilent, et tiel partition est assets bone. Et si apres l'eigne ou le mulnes parcener voile fayre partition inter eux de ceo que ils teignent, ils poient ceo bien faire quant a eux pleist. Mes lou partition serra*

AL S O, another partition may be made betweene parceners, which varieth from the partitions aforesaid. As if there bee three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenarie that which to them belongeth, without partition, in this case, if one part be allotted in severalty to the youngest sister, according to that which shee ought to have, then the others may hold the remnant in parcenarie, and occupy in common without partition, if they will, and such partition is good enough. And if afterwards the eldest or middle parcener will make partition betweene them

Lib. 3. Cap. 2. Of Parceners by Custome. Sect. 276.

serra fait per force de briefe de partitione faciendâ, là autrement est; car là covient, que chescun parcener avera sa part en severaltie, &c.

Plus serra dit des parceners en le Chapter de Joyntenants, et auxy en le Chapter de Tenants in Common.

them of that which they hold, they may well do this when they please. But where partition shall be made by force of a writ of *partitione faciendâ*, there it is otherwise; for there it behoveth, that every parcener have her part in severaltie, &c.

More shall be said of parceners in the Chapter of Joyntenants, and also in the Chapter of Tenants in Common.

24. H. 3. tit.
Partic. 19.

Regula.

HERE it is to be observed, that this partition is good by consent, for *consensus tollit errorem*; but if it be by the king's writ, then everie parcener must have his part. And here you may see that *modus et conventio vincunt legem*.

“*En severaltie, &c.*” Here by this &c. is implied another kind of severaltie than our author hath mentioned: and that is, that the one parcener shall have the land in severaltie from the feast of Easter until the gyle of August, (that is, the first of August) and the other in severaltie from thence untill the feast of Easter, or the like, *et sic alternis vicibus* to them and their heires *in perpetuum*, whereof sufficient hath beene spoken before. (1)

(1) Ant. 4. 3. and 167. 2.

CHAP. 3.

Of Joyntenants.

Sect. 277.

JOYNTENANTS sont, si-
come home seisie de certaines terres
ou tenements, &c. et enfeoffe deux, trois,
quater, ou plusors, a aver et tener a eux
pur term de leur vies, ou pur terme
d'auter vie, per force de quel feoffment
ou lease ils sont seisies, tiels sont joyn-
tenants.

JOYNTENANTS are, as
if a man bee seised of certaine
lands or tenements, &c. and infeofeth
two, three, foure, or more, to have
and to hold to them for term of their
lives, or for term of another's life,
by force of which feoffment or lease
they are seised; these are joyntenants:

THIS agreeth not with the original, (2) for it should bee,
joyntenants sont, sicome home seisie de certaine terres ou tenements,
&c. et ent enfeoffe deux, ou trois, ou quater, ou plusors, a aver et tener
a eux et a leur heires, ou lessa a eux pur terme de leur vies, ou pur
terme d'auter vie, per force de quel feoffment ou lease, &c. The er-
ror may easily bee perceived by that which is in print, viz. "by
[180. b.] "force of which feoffment or lease," &c. ergo there must be feoff-
ment and lease spoken of before.

Bract. li. 4. fo.
262. (3) Brit.
ca. 35. & fo. 112.
Flet. lib. 3. ca. 4.
10. & li. 6. ca.
47. (4)
(2. Ro. Abr.
86.)

There be also joyntenants by other conveyances than *Littleton*
here mentioneth, as by fine, recoverie, bargaine and sale, release,
confirmation, &c. So there be divers other limitations than *Little-*
ton here speaketh of: as if a rent charge of ten pounds be granted
to *A.* and *B.* to have and to hold to them two, viz. to *A.* untill he
be married, and to *B.* untill he be advanced to a benefice, they be
joyntenants in the meane time, notwithstanding the severall limita-
tions; (1) and if *A.* die before marriage; the rent shall survive;
but if *A.* had married, the rent should have ceased for a moiety, et
sic è converso on the other side.

Littleton having spoken of one kinde of tenants *pro indiviso*, viz.
of parceners, commeth now to another, viz. joyntenants: and first
of joyntenants of freehold. If an alien and a subject purchase lands
in fee, they are joyntenants; and the survivorship shall hold place;
(2) *et nullum tempus occurrit regi*, upon an office found.

7. E. 4. 29.
11. H. 4. 26.
(5. Co. 52.)

"Joyntenants." So called, because the lands or tenements,
&c. are conveyed to them jointly, *conjunctim feoffati*, &c. or *qui*
conjunctim tenent, and are distinguished from sole or severall te-
nants, from parceners; and from tenants in common, &c. and an-
ciently they were called *participes, et non heredes*. And these joyn-
tenants must jointly implead and jointly be impleaded by others,
(3) which proprietie is common betweene them and coparceners;

Flet. lib. 6. ca.
47. Bract. lib. 5.
fol. 435. a.
(Noy 13. Ant.
164. Cro. Jam.
83. 166. Post.
but Sect. 311.)

(2) [See Note 53.]

(3) I take this reference to *Bracton* to be
erroneous. But in fol. 28. a. of *Bracton*
there is a chapter, which connects with
Littleton's on jointenancy; the first branch
of it being *de donationibus factis pluribus*
mul sive successe. See also *Bract.* fo. 12.
1. and 13. a.

(4) It should be cap. 48. to which as a
corresponding part of an almost co-m-

porary writer add *Bract.* fol. 428. a.

[180. b.]

(1) [See Note 54.]

(2) [See Note 55.]

(3) See the statute *de conjunctim f. offatis*
34. E. 1. lord Coke's notice of it in 2. Inst.
527. and *Teloall's Dig. Orig. B.* in the
Chapter on *Joyntenants* in b. 2. fol. 456.

but joyntenants have a sole qualitie of survivorship, which coparceners have not. *Littleton*, having now spoken of parceners and of joyntenants of right, doth next speake of joyntenants by wrong.

Sect. 278.

ITEM, si deux ou trois, &c. disseisent un autre d'ascun terres ou tenements a leur use demesne, donques les disseisors sont joyntenants. Mes s'ils disseisent un autre al use d'un de eux, donques ils ne sont joyntenants; mes celuy a que use le disseisin est fait est sole tenant, et les autres n'ont riens en le tenancie, mes sont appels coadjutors a le disseisin, &c.

AL S O, if two or three, &c. disseise another of any lands or tenements to their own use, then the disseisors are joyntenants. But if they disseise another to the use of one of them, then they are not joyntenants; but hee to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin, &c.

IT is to bee observed, that some disseisors be tenants of the land, and some be no tenants of the lands; and of both these kinds *Littleton* here speaketh.

“&c.” In the first &c. nothing is implied, but foure or five, or more. But in the latter &c. many things be to bee understood. As of disseisors that be no tenants, some are coadjutors, whereof *Littleton* here speaketh, some counsellors, commanders, &c. when the disseisin is not to bee done to any of their uses. Also if A. disseise one to the use of B. who knoweth not of it, and B. assent to it, in this case til the agreement A. was tenant of the land, and after agreement B. is tenant of the land, but both of them be disseisors: for omnis ratihabitio retrotrahitur et mandato equiparatur. (4) And it is worthie of the observation, and implied also in the latter &c. that seeing coadjutors, counsellors, commanders, &c. are all disseisors, that albeit the disseisor which is tenant dieth, yet the assise lieth against the coadjutor, counsellor, commander, &c. and the tenant of the land, (5) though he be no disseisor. (6)

50. E. 3. 2.
17. Aff. 14.
14. Aff. 12.
8. Aff. p. 50.
10. F. 3. 47.
10. Aff. 22.
27. H. 8. tit.
disseis. p. 77.
22. Aff. 21.
27. Aff. 50.
12. E. 4. 9.
7. E. 4. 7. b.
38. Aff. 7.
21. H. 7. 35.
29. Aff. 50.
21. H. 8. 25.
35. H. 6. 61.
21. E. 4. 46.
Abr. 660. Post.

15. E. 4. 15. F. N. B. 179. g. (Mo. 53. Post. 374. a. Ant. 10. a. 1. Ro. 188. a.) (Post. 245. a. 258. a.) 1. Ro. Abr. 663.)

[a] 50. E. 3. 2.
(Cro. Cha. 303.
1. Ro. Abr. 661,
667. Post. 323.
a.)

[a] The demandant and others in a *præcipe* did disseise the tenant to the use of the others, and the writ did not abate; for the demandant was a disseisor, but gained no tenancy in the land, for that he was but a coadjutor.

A man disseiseth tenant for life to the use of him in the reversion, and after he in the reversion agreeth to the disseisin, it is said, that he in the reversion is a disseisor in fee, for by the disseisin made by the stranger, the reversion was divested, (7) which (say they) cannot bee revested by the agreement of him in the reversion, [181. a.] for that it maketh him a wrong doer, and therefore no relation of an estate by wrong can helpe him. (1)

“Coadjutor.”

(4) [See Note 56.]

(7) [See Note 57.]

(5) That is, he that is seised of the freehold by title from the disseisor, as by feoffment lease or descent from him.

[181. a.]

(1) [See Note 58.]

(6) See ant. 154. b.

"Coadjutor." Coadjutor est qui auxiliatur alteri, and is derived
 & coadjuvando. Anglicè a fellow helper.

Sect. 279.

ET nota que disseisin est properment,
 lou un home entra en ascun terres
 ou tenements lou son entre n'est pas con-
 geable, et ousta celuy que ad franktene-
 ment, &c.

AND note that disseisin is pro-
 perly, where a man entreth into
 any lands or tenements where his en-
 try is not congeable, and ousteth him
 which hath the freehold, &c.

THIS description of a disseisin and the &c. in this place is
 understood onely of such lands and tenements whereunto an
 entry may bee made, and not of rents, commons, &c. (2) whereof
 sufficient hath been said before (3) in the Chapter of Rents; and so
 in effect Littleton described it before the edition of his book. And
 note here, that every entry is no disseisin, unlesse there be an ouster
 also of the freehold. And therefore Littleton doth not set downe
 an entrie onely but an ouster also, as an entry and a claimer, or
 taking of profits, &c.

Now as there be joyntenants by disseisin, so are there joyntenants
 by abatement, intrusion, and usurpation, all which are included in
 the latter &c.

3. E. 4. 2.
 34. Aff. 11, 12.
 26. Aff. 17.
 41. Aff. 10.
 24. E. 3. 31.
 Pl. Com. 89.
 Parson de Hony
 Lane 7. Aff. 10.
 11. Aff. 25.
 12. E. 3. tit.

Aff. 88. 45. Aff. 7. 9. Aff. 19. 39. Aff. 1. 18. E. 2. Aff. 374.

Sect. 280.

ET est asçavoir, que la nature de
 joyntenance est, que celuy que sur-
 vesquist avera solement l'entier tenancie
 solonques tiel estate que il ad, si le joyn-
 ture soit continue, &c. Sicome si trois
 joyntenants sont en fee simple, et l'un ad
 issue et devie, uncore ceux que surves-
 quont averont les tenements entier, et
 l'issue n'avera riens. Et si le second
 joyntenant ad issue et devie, uncore le
 tierce que survesquist avera les tene-
 ments entier, et eux avera a luy et a ses
 heires a tous jours. Mes autrement est
 de parceners; car si trois parceners
 sont, et devant ascun partition fait l'un
 ad issue et devie, cco que a luy affiert
 descendra a son issu. Et si tiel parce-er
 morust

AND it is to be understood, that
 the nature of joyntenancy is, that
 he which surviveth shall have only the
 entire tenancie according to such es-
 tate as he hath, if the joynture be con-
 tinued, &c. As if three joyntenants
 bee in fee simple, and the one hath
 issue and dieth, yet they which sur-
 vive shall have the whole tenements,
 and the issue shall have nothing. And
 if the second joyntenant hath issue and
 dye, yet the third which surviveth
 shall have the whole tenements to him
 and to his heires for ever. But other-
 wise it is of parceners; for if three
 parceners be, and before any parti-
 tion made the one hath issue and dy-
 eth,

(2) In respect to disseisin of rents, read
 post. 306. b. 323. a. and b.

(3) Ant. Sect. 233. and the comment
 thereon.

morust sans issue, donques ceo que a lui affiert descendra a ses coheires, issint que ils averont ceo per descent, et nemy per survivor, come joyntenants averont, &c.

eth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shal descend to her coheires, so as they shal have this by descent, and not by survivor, as joyntenants shall have, &c.

“*SI le joynture soit continue, &c.*”

Here, by this &c. many points of learning are to bee observed. As that it is proper to joyntenants onely to have lands by survivor; for no survivor of other tenants *pro indiviso* shall have the whole by survivor, but only joyntenants: and this is called in law *jus accrescendi*. *Omnes feoffati sunt simul habendi et tenendi, nec totum nec partem separatam nec per se, sed ut quilibet eorum totum habeat cum aliis in communi; et cum unus moriatur, non descendit aliqua pars hæredi morientis, nec separata nec in communi ante mortem omnium, sed pars illa communis per jus accrescendi accrescit superstitibus de personâ ad personam usque ad ultimum superstitem.* But although survivorship bee proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, soli et semper*; for there may bee joyntenants, though there be not equall benefit of survivor on both sides. As if a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* dyeth, *A.* shall have all by the survivor, but if *A.* dyeth, *B.* shall have nothing. (1)

[181. b.]

(9. Co. 75. b.)

(1. Sid. 6.)

[b] 39. Aff. p. 17.
30. H. 8. tit.
devise B. Dyer 3.
Eliz. 190.
49. E. 3. 16.
2. Eliz. Dyer 177.
23. Eliz. Dyer
371. 4 Eliz.
Dyer 210.
(Mo. 61. 341.)
10. H. 4. 2, & 3.
14. H. 4. 34.
39. H. 6. 42.
31. Aff. 20.
33. H. 8. joynt.
Br. 62.
30. H. 8. con-
dition Br. 190.
[c] 38. H. 8. 8.
Dyer 62.
27. H. 8. fol. 6.
(5. Co. 91.
Yelv. 25, 26.
Cro. Eliz. 913, 914.)
(Hutt. 127.)

Two or more may have a trust or an authoritie committed to them jointly, and yet it shall not survive. But herein are divers diversities to be observed. First, there is a diversitie betweene a naked trust or an authoritie, and a trust or authoritie joynted to an estate or interest. (2) Secondly, there is a diversitie between authorities created by the partie for private causes, and authoritie created by law for execution of justice. As for example, [b] if a man devise that his two executors shall sell his land, if one of them dye, the survivor shall not sell it; (3) but if he had devised his lands to his executors to be sold, there the survivor shall sell it; which diversitie is implied by our author, for hee saith, that he that surviveth shall have the entire tenancie.

If a man make a letter of attorney to two, to do any act, if one of them dye, the survivor shall not do it: but if a *venire facias* be awarded to foure coroners to impannell and returne a jury, and one of them dye, yet the other shall execute and returne the same.

If a charter of feoffment [c] be made, and a letter of attorney to foure or three jointly or severally to deliver seisin, two of them cannot make liverie; because it is neither by them foure or three jointly, nor any of them severally; but if the sherife upon a *capias* directed to him make a warrant to foure or three jointly or severally to arrest the defendant, two of them may arrest him, because it is for the execution of justice [d], which is *pro bono publico*, and therefore

[d] Pasch. 45. Eliz. in the king's bench betweene King and Hobbes.

(1) See further as to benefit of survivorship, on one side only, post. 193. a. 239. b. & Dy. 10. b.

(2) See ant. 112. b. 113. a. post. 297. a.

(3) [See Note 59.]

therefore shall be more favourably expounded, then when it is onely for private; and so hath it beene adjudged. (4) *Jura publica ex privato promiscuè decideri non debent.*

“*Et devie.*” Note, there is a naturall death and a civil death, and *Littleton*’s case is to be intended of both; and therefore [e] [e] 21. R. 2. if two joyntenants be, and one of them entreth into religion, the judgment 263. survivor shall have the whole. (5) (Ant. 132. b.)

Sect. 281.

ET come le survivor tient lieu enter joyntenants, (6) en mesme le maner il tient lieu enter eux queux ont joynt estate ou possession ove auter de chattel, real ou personall. Sicome si leas de terres ou tenements soit fait a plusors pur terme des ans, celui, que survesquist de les leseees, avera les tenements a luy entier durant le terme per force de mesme le leas. Et si un chival, ou un auter chattel personall sont done a plusors, celui que survesquist avera le chival solement.

AND as the survivour holds place betweene joyntenants, in the same manner it holdeth place betweene them which have joynt estate or possession with another of a chattell, reall or personall. As if a lease of lands or tenements bee made to many for terme of yeares, hee, which survives of the leseees, shall have the tenements to him only during the terme by force of the same lease. (1) And if a horse, or any other chattell personall be given to many, hee which surviveth shall have the horse onely.

HEREBY it is manifest, that survivor holdeth place regularly as well betweene joyntenants of goods and chattels in possession or in right, as joyntenants of inheritance or freehold. (Cro. Eliz. 33. 2. Ro. Abr. 86. 87.)

“*Chattell,*” or *Catell*, whereof commeth the word used in law [f] *Catalla*, and is, as *Littleton* here teacheth, two-fold, viz. reall and personall, and putteth examples of both. [f] Regist. origin. 139. 244. Bract. lib. 2.

39. H. 6. 35. Stanford Pr. 45.

Sect. 282.

EN mesme le maner est de detts et duties, &c. car si un obligation soit fait a plusors pur un debt, celui que survesquist avera tout le det ou dutie. Et issint est d’autres covenants et contracts, &c. (3)

IN the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, hee which surviveth shall have the whole debt or dutie. And so is it of other covenants and contracts, &c.

NOW

(4) See acc. as to warrant of the peace to two, *Lambard’s Justice* ed. 1602. p. 84.

(5) See ant. note 7. of fol 3. b. and note 1. of fol. 132. b. Add *Ley’s case* 2. Ro. Abr. 43.

(6) &c. in L. & M. and Roh.

[182. a.]

(1) [See Note 60.]

(3) No &c. in L. & M. nor Roh.

NOW he speaketh of debts, duties, covenants, contracts, &c. (2)

(1. Ro. Abr. 6.)
F. N. B. 117. E.
38. E. 3. 7.

(Ant. 172. a.
Cro. Jam. 306.
1. Ro. Abr. 6.
Cro. Cha. 301.
1. Sid. 236.
179.) (5)

“*Dets et duties, &c.*” Here by force of this &c. an exception is to be made of two joynt merchants; for the wares, merchandizes, debts or duties, that they have as joynt merchants or parteners, shall not survive, but shall goe to the executors of him that deceaseth; and this is *per legem mercatoriam*, which (as hath beene said) is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. (4)

And to the latter &c. in this Section the like exception must be made.

Sect. 283.

ITEM, ascuns jointenants poient estre, que poient aver joint estate, et estre jointenants pur terme de leur vies, et uncore ils ont severall enheritances. Sicome terres soient dones a deux homes et a les heires de leur deux corps engendres, en cest case les donees ont joint estates pur terme de leur deux vies, et uncore ils ont severall inheritances; car si l'un des donees ad issue et devy, l'auter que survesquist avera tout per le survivor pur terme de sa vie, et si celui que survesquist ausy ad issue et devy, donques l'issue del un avera l'un moitie, et l'issue del auter avera l'auter moitie de la terre, et ils tiendront la terre enter eux en common, et ne sont pas joyntenants, mes sont tenants en common. Et la cause, pur que tielx donees en tiel cas ont joynt estate pur terme de leur vies, est, pur ceo que al commencement les terres fueront dones a eux deux, les queux parols sans plus dire font joint estate a eux pur terme de leur vies. Car si home voit lesser terre a un auter per fait ou sans fait, nient feasant mention quel estate il auroit, et de ceo fait livery de seisin, en ceo case le lessee ad estate

AL S O, there may be some joyntenants, which may have a joint estate, and be jointenants for terme of their lives, and yet have severall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have severall inheritances; for if one of the donees hath issue and dye, the other which surviveth shall have the whole by the survivor for terme of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moitie, and the issue of the other shall have the other moity of the land, and they shal hold the land betweene them in common, and they are not joyntenants, but are tenants in common. And the cause, why such donees in such case have a joynt estate for terme of their lives, is, for that at the beginning the lands were given to them two, which words without more saying make a joint estate to them for terme of their lives. For if a man will let land to another by deed or without deed,

(2) See further, as to things of which there shall be a survivorship, and where express words are necessary to give that benefit, 11. Co. 3. b. 2. Ro. Abr. 86. B. 2. 2. P. Wms. 672. and tit. survivor in Vin. Abr. and tit. jointenants B. 1. & D. ibid.

(4) See more fully as to this 2. Brownl.

99. See also acc. Noy 55.

(5) These additional references are retained, though they scarce deserve it; for they only relate to different instances of the *lex mercatoria*, and do not touch the particular rule against the *jus accrescendi*.

tate pur terme de sa vie ; et issint entant que les terres fueront dones a eux, ils ont joint estate pur terme de lour vies. Et la cause pur que ils averont several enheritances est ceo, entant que ils ne poient aver per nul possibility un heire enter eux engender, sicome home et feme poient aver, &c. donque la ley voet que leur estate et leur enheritance soit tiel com: reason voet, solonque la forme et effect des parols del donee, et ceo est a les heires que l'un engendra de son corps per ascun de ses femes (1) [et a les heires que l'auter engendra de son corps per ascun de ses femes] &c. issint il covient per necessitie de reason, que ils averont severalx inheritances. Et en tiel cas si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad ascun issue en vie de son corps engendre, donque le donor ou son heire poit enter en la moity come en son reversion, &c. coment que l'autre des donees ad issue en vie, &c. Et la cause est que entant que les enheritances sont several, &c. le reversion de eux en ley est several, &c. et le survivor del issue del auter ne tiendra pas lieu d'aver l'entiertie.

And the reason is, forasmuch as the inheritances be several, &c. the reversion of them in law is several, &c. and the survivor of the issue of the other shall hold no place to have the whole.

deed, not making mention what estate he shall have, and of this make liverie of seisin, in this case the lessee hath an estate for terme of his life ; and so in as much as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them ingendred, as a man and woman may have, &c. the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heires which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives, &c. so as it behoveth by necessitie of reason, that they have several inheritances. And in this case if the issue of one of the donees after the death of the donees dye, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moity as in his reversion, &c. although the other donee hath issue

" *LS ont joynt estate pur terme de lour deux vies, &c.*" Note, Vide Sect. 296. albeir they have severall inheritances in taile, and a particular estate for their lives, yet the inheritance doth not execute and so breake the joynttenancy, but they are joynttenants for life, and tenants in common of the inheritance in taile. (Post. 189. b.)

[182. b.] " *Sicome home et feme poient aver, &c.*" Here a diversity is implied, when the estate of inheritance is limited by one conveyance, as in this case it is, there are no severall estates to drowne one in another. But when the estates are divided in severall conveyances, their particular estates are distinct and divided, and consequently the one drownes the other. As if a lease bee made to two men for terme of their lives, and after the lessor granteth the reversion to them two, and to the heires of their two bodies, the joynture is severed, and they are tenants in common in possession. And it is further implied, that in this case of Littleton there is no division betweene the estate for lives, and the severall inheritances ; for in this case they cannot convey away the inheritances after their decease,

Vide Westcote's case. 2. Co. 62, 61. (1. Sid. 83.)

Viñ. 12. E. 4. 2. b.

(1) In L. and M. and Ro the following words here placed between brackets are omitted.

(Sect. 285.)

[f] 39. H. 6.
2. b.(4. Leon. 37.
Post. 299. b.
Cro. Jam. 260,
261.)[g] Wescot's
case, ubi supra.

Ibidem 7. H. 6.

[h] 17. E. 3. 51.
8. 18. E. 3. 39.
10. E. 3.
Statham tit.
done. 50. E. 3.
feoffments &
sautz 97.

(Ant. 13. a.)

[i] 44. E. 3.
taile 13.
8. Aff. 33.
24. E. 3. 29.
7. H. 4. 16.
Corbet's case1. Co. 84. l. 4.
Marne Dier 145.
See before in the
Chapter of Ten.
by the Curtesie,
Sectione
(Ant. 30. a.
2. Ro. Abr. 90.)
[k] Pl. Com. in
Throgmorton's
case.
(2. Co. 23. 55.
5. Co. 111
2. Ro. Abr. 66.)
Regula.
15. Co. 8. a.
Plowd. 161. a.
Ant. 42. a.)

cease, (1) for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed, as shall bee said hereafter.

If a man make a lease for [f] life, and after granteth the reversion to the tenant for life and to a stranger and to their heires, they are not joyntenants of the reversion, but the reversion is by act of law executed for the one moitie in the tenant for life, and for the other moitie he holderh it still for life, the reversion of that moitie to the grantee.

And so it is, if a man maketh a lease [g] to two for their lives, and after granteth the reversion to one of them in fee, the joynture is severed, and the reversion is executed for the one moitie, and for the other moitie there is tenant for life the reversion to the grantee. (2)

If lessee for life granteth his estate to him in the reversion, and to a stranger, the joynture is severed and the reversion executed for the one moitie by the act of law. (3)

If a man maketh a lease for life and granteth the reversion to two in fee, the lessee granteth his estate to one of them, they are not joyntenants of the reversion; for there is an execution of the estate for the one moitie, and an estate for life, the reversion to the other of the other moitie (2). [183. a.]

Here Littleton hath well resolved a doubt; for of ancient time it hath beene said, [h] that when lands have beene given to two women and to the heires of their two bodies begotten (which case our author putteth in the next Section) that the husband having issue should bee tenant by the courtesie living the other sister; for that as some held the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband to be tenant by the curtesie, which hee could not bee if the women had a joynt estate for terme of their lives: and likewise it was said [i] that the issue of the one should recover the moytie in a *formedon* living the other sister. But *verba sunt hæc*, and Littleton, grounding himselfe upon good authority in law, hath cleared this doubt.

“*Nient feasant mention quel estate il averoit.*” Here Littleton addeth materially (not making mention of what estate); for [k] if in the premisses lands bee letten, or a rent granted, the general intendment is, that an estate for life passeth; but if the *habendum* limit the same for yeares or at will, the *habendum* doth qualifie the generall intendment of the premisses. And the reason of this is, for that it is a maxime in law, that every man's grant shall be taken by construction of law most forcible against himselfe. *Qualibet concessio fortissime contra donatorem interpretanda est*; which is so to be understood, that no wrong be thereby done; for it is another maxime in law, *quod legis constructio non facit injuriam*. And therefore if tenant for life make.h a lease generally, this shall bee taken by construction of law an estate for his owne life that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion. And so it is if tenant in taile make [183. b.]

(1) See post. 184. b.

(2) [See Note 61.]

(3) See post. 192, 200. b. 335. a.

[183. a.]

(2) [See Note 62.]

make a lease generally, the law shall contrive this to be such a lease as hee may lawfully make, and that is for terme of his owne life; for if it should be for the life of the lessee, it should be a discontinuance, and consequently the state which should passe by construction of law should worke a wrong. (1)

“*Et issint entant que les terres fueront dones a eux ils ont joynt estate pur leur vies.*” This is plaine, but with this exception, unless the *habendum* doth otherwise limit the same. And therefore if a lease be made [1] to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premisses, (2) and so hath it beene oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explaine the other, and no repugnancy betweene them, *et semper expressum facit cessare tacitum.* (3)

[1] 8. E. 3. 427. tit. feoffem. & faits 73.
30. H. 8. tit. joynt. Br. 53.
Dyer fo. 361.
Pl. Com. 160.
(Hob. 171.
Post. 190. b.
2. Ro. Abr. 65.
68. 1. Leon. 10.
11)

“*Per nul possibilitie.*” Here it is to be observed, that where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibilitie may take effect, which is worthy of observation. *Benignæ faciendæ sunt interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.*

Bracton.
(2. Ro. Abr. 66.
5. Co. 19. a.
Hob. 313.)

“*Issint il convient per necessite de reason.*” The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof, he shall soone forget his superficial knowledge. But when hee findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not onely serve him for the understanding of that particular case, but of many others; for *cognitio legis est copulata et complicata*; and this knowledge will long remaine with him. All which is plainly implied by the words and &c. of our author in this Section.

“*Et en tiel case si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad aucun issue en vie de son corps engendre, denques le doner ou son heire poet enter en le moitie.*” This is mistaken in the imprinting, and varieth from the originall, (4) which is, *si l'un donee ou l'issue d'un des donees apres la mort de donees devie, issint que il n'ad aucun issue, &c.* For it is evident, that if the one donee himselfe dieth without issue, the inheritance doth revert for a moiety, and after the decease of the other donee, the donor may enter into that moiety; and whether the issue of the one donee dieth without issue at any time, either in the life of the other donee, or after his decease, it is not materiall, for whensoever no issue is remaining of the one donee, so as the state taile is spent, the donor may after the decease of the surviving donee enter into that moiety. (5)

“*Et*

(1) Acc. ant. 42. a. and there the reason is more fully expressed.

(2) Acc. Perk. test. 174.

(3) Acc. Sect. 298. See also 2. Co. 55. a. & b. ant. 180. b. post. 189. a. 297. b.

(4) But lord Coke's correction is not conformable either to L. and M. nor the Roh. edition.

(5) See Hob. 33.

Lib. 3. Cap. 3. Of Joyntenants. Sect. 284.

Arist. 1. Metaphys.

“*Et la cause est, que entant que les inheritances, &c.*” Littleton in this Chapter hath often said, *et la cause est*, which is worthie of observation, for then wee are truely said to know any thing when we know the true cause thereof. *Tunc unumquodque scire dicimur, cum primam causam scire putamus. Scire autem propriè est rem rationè et per causam cognoscere.*

Virg. 1. Georg.

Fælix qui potuit rerum cognoscere causas.

And therefore all students of law are to apply their principall in-deavour to attaine therunto, all which is implied by the words and severall &c. in this Section.

(Post. 191. b. Hob. 33.)

Here the cause of the entrie of the donor into a moitie in this case is, that in as much as the inheritance is severall, the reversion is severall. Therefore upon the severall determination of the estate in taile, the donor may enter. And the law termeth a reversion to bee expectant upon the particular estate: because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect or looke for to enjoy the lands or tenements againe.

Dyer 14. El. 300.

“*Le reversion de eux en ley est severall, &c.*” Hereby, and by this &c. is implied, that upon one joint or entire gift or lease there is one joynt or entire reversion, and upon severall gifts or leases there bee severall reversions. And this is to be understood of the reversion in the donor or his heirs. But albeit the gifts or leases be severall, yet if the donors or lessors grant the reversion to two or more persons and their heirs, they are joyntenants of the reversion. And so it is of a remainder. And therefore if a gift be made to two men and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joyntenants for life, tenants in common of the state taile, and joyntenants of the fee simple in remainder; for they are joynt purchasers of the fee simple, and the remainder in fee is a new created estate, but the reversion remaining in the donor or his heirs is a part of his ancient fee simple.

(2. Co. 60. b. post. 299. b.)

[184. a.]

Sect. 284.

ET sicome est dit de males, en mesme le manner est lou terre est done a deux females, et a les heires de leur deux corps engendres.

AND as it is said of males, in the same manner it is where land is given to two females, and to the heirs of their two bodies engendred.

44. E. 3. tit. Taile 13.

(Ant. 25. b.)

(2. Ro. Abr. 48.

1. Co. 120.

156. b. Ant. 46.

b. 10. Co. 50. b.)

IF a man giveth lands to two men and one woman, and the heirs of their three bodies begotten, in this case they have severall inheritances; for albeit it may be said, that the woman may by possibility marry both the men one after another; yet first, she cannot marrie them both *in præsentia*, and the law will never intend a possibility upon a possibility, as first to marry the one, and then to marry the other (1); secondly, the form of the gift is, to the heirs

(1) [See Note 63.]

heires of their three bodies, which is not possible, and therefore they shall have severall inheritances. And so it is, if a gift be made to one man and to two women, *mutatis mutandis*. In the same manner, if a gift in taile be made to a man and his mother, [m] or to a man and his sister (2), or to him and his aunt, &c. in this and like cases, albeit the gift is made to a man and a woman, yet they have severall inheritances; because they cannot marry together, and are within the rule and reason of our author. [m] 18. E. 3. 39. 7. H. 4. 16.

Sect. 285.

ITEM, si terres soyent dones a deux et a les heires de l'un de eux, ceo est bone jointure, et l'un ad franktenement, et l'auter ad fee simple. Et si celuy que ad le fee devie, celuy que ad le franktenement avera l'entiertie per le survivor pur terme de sa vie. En mesme le manner est, lou tenements sont dones a deux et les heires del corps d'un de eux engendres, l'un ad franktenement, et l'auter ad fee taile, &c.

AL S O, if lands be given to two and to the heires of one of them, this is a good joynture, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entiertie by survivor for terme of his life. In the same manner it is, where tenements bee given to two and the heirs of the body of one of them engendred, the one hath a freehold, and the other a fee taile, &c.

BY this Section, and the &c. in the end of it, they are joyntenants for life, and the fee-simple or estate taile is in one of them; and because it is by one and the same conveyance, they are joyntenants, and the fee-simple is not executed to all purposes as hath beene said before (3). (2. Co. 60. b.) (Sect. 283.)

If a fine bee levied to two, [n] and to the heires of one of them, by force whereof hee is seised, he that hath fee dieth, and after the joyntenant for life dieth, and an estranger abates, in this case the heire may either suppose the fee simple executed, and have an assise of Mortdauncester, the words of which writ be, *Si R. pater fuit seistus die quo obiit in dominico suo ut de feodo*; which cannot bee said of him that hath but a remainder expectant upon an estate for life; but in respect that he is seised of a fee simple, and of a joynt estate in possession, the words in the writ be true, that he was seised in *dominico suo ut de feodo* (4). Likewise the heir may have a writ of right, which also in some sort proves the fee simple executed; or the heir may have a *scire facias* to execute the fine, by which the heir supposeth that the fee was not executed, or he may maintain a writ of intrusion where the heire maketh the like supposition, and shall terme it a remainder. (1) And yet when land is given

(2) See Dy. 326. a.

(3) Ant. 182. b. See also post. 297. b. Fearn on Conting. Rem. 23, 24. 26. 28, 29. Bro. Nouv. Caf. pl. 260. 303. 387. These references will introduce the reader to most of the learning on this curious

point.

(4) See however Bro. Nouv. Caf. pl. 115, which is *contra*.

[184. b.]

(1) [See Note 64.]

given to two and to the heires of one of them, he in the rem cannot grant away his fee simple, as hath beene said. (2)

Sect. 286.

IT E M, si deux joyntenaunts sont seises d'estate en fee simple, et l'un graunt un rent charge per son fait a un auter hors de ceo que a luy affiert (3), en cest case durant la vie le grantor le rent charge est effectuell; mes apres son deceffe le grant de le rent charge est void, quant a charger la terre, car celuy que ad la terre per le survivor tiendra tout la terre discharge. Et la cause est, pur ceo que celuy que survesquist clayma et ad la terre per le survivor, (4) et nemy ad, ne poet de ceo claymer rien per discent de son compaignon, &c. Mes auterment est de parceners, car si soient deux parceners des tencments en fee simple, et devant ascun partition fait l'un charge ceo que a luy affiert per son fait d'un rent charge, &c. et puis morust sans issue, per que ceo que a luy affiert discent a l'auter parcener, en cest case l'auter parcener tiendra la terre charge, &c. pur ceo que il vient a cel moitie per discent, come heire, &c. cener shall hold the land charged, &c. because shee came to this moity by descent, as heir, &c.

AL S O, if two joyntenants be seised of an estate in fee simple, and the one grants a rent-charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent charge is effectuell; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shall hold the whole land discharged. And the cause is, for that he which surviveth claimeth and hath the land by the survivor, and hath not, nor can claime any thing by descent from his companion, &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, and before any partition made the one chargeth that which to her belongeth by her deed with a rent charge, &c. and after dieth without issue, by which that which belongeth to her descends to the other parcener, in this case the other parcener, in this case the other parcener, because shee came to this moity by de-

F. N. B. 204. E.
207. 7. H. 6. 2.
13. H. 7. 22.
10. E. 3. 34.
17. R. 2. tit.
charge 15.
5. H. 5. 8.
Vide Sect. 289.
(6. Co. 79. a.)

[o] 9. H. 6. 32.
(Hob. 3. Plowd.
418. b.)

[p] 8. E. 3. tit.
execution Sta-
tham.

“**C**LAIMER riens per discent de son compaignon, &c.” By which, &c. is implied, that so it is if one joyntenant acknowledge a recognisance or a statute, or suffreth a judgment in an action of debt, &c. and dieth before execution had, it shall not be executed afterwards. (5) But if execution be sued in the life of the consor, it shall bind the survivor. And it is further implied, that both in the case of the charge and of the recognisance statute and judgement, if he that chargeth, &c. survive, it is good for ever.

And so it is [o] if a man be possessed of certaine lands for term of yeares in the right of his wife, and granteth a rent charge, and dyeth, the wife shall avoyd the charge; (6) but if the husband had survived, the charge is good during the terme.

If a villeine purchase lands, and binde himselfe in a recognisance, if the lord enter before [p] execution, the lord shall avoyde the

(2) [See Note 65.]

(3) &c. in L. and M. & Roh.

(4) &c. in L. and M. & Roh.

(5) See acc. 7. H. 7. 13. b. & 2. Ro. Abr. 88.

(6) [See Note 66.]

the same, as hath beene said. But otherwise it is if he had made a lease for yeares, for the reason that *Littleton* here yeeldeth in this Section. (7)

[185. a.] If two joyntenants bee of a terme, [q] and the one of them grant to *I. S.* that if he pay to him ten pound before *Michaelmasse*, that then he shall have his terme, the grantor dyeth before the day, *I. S.* payes the summe to his executors at the day, yet hee shall not have the terme, but the survivor shall hold place; for it was but in nature of a communication: (1) but if he had made a lease for yeares, to begin at *Michaelmasse*, it should have bound the survivor. (2)

[q] 14. H. 8. 22.
Pl. Com. 263. b.
in dame Hales
case.
(Finch's L. 97.
6. Co. 35. 2. Ro.
Abr. 88, 89.
Cro. Jam. 91,
92.)

And where *Littleton* putteth the case of a rent charge, it is so likewise implied, that if one joyntenant granteth a common of pasture, or of turbary, or of estovers, or a corody, or such like, out of his part, or a way over the land, this shall not bind the survivor: for it is a maxime in law, that *jus accrescendi præfertur oneribus*; and there is another maxime, that *alienatio rei præfertur juri accrescendi*.

45 E. 3. 13.
Vide Sect. 289.

If one joyntenant in fee simple be indebted to the king, and dyeth, [r] after his decease no extent shall be made upon the land in the hands of the survivor.

[r] 40. Aff. 36.
50. Aff. 5.
F. N. B. 149. q.
Pl. Com. 321.
(1. Co. 86. Post.
352. a.)

If a recovery be had against one joyntenant, who dyeth before execution, the survivor shall not avoid this recovery; because that the right of the moitie is bound by it.

If one joyntenant in fee take a lease for yeares of an estranger by deed indented and dyeth, the survivor shall not be bound by the conclusion; because he claymes above it, and not under it.

“*Et la cause est, par ceo que celui que sur-vesquist clame et ad la terre per survivor, &c.*” Here againe *Littleton* sheweth the reason: and the cause, wherefore the survivor shall not hold the land charged, is, for that he claymeth the land from the first feoffor, (3) and not by his companion, which is *Littleton's* meaning when he saith, (that he claymeth by survivor) for [s] the surviving feoffee may plead a feoffment to himselfe without any mention of his joynt feoffee. (4) And this is the reason, that if two joyntenants bee in fee, and the one maketh a lease for yeares, reserving a rent and dyeth, the surviving feoffee [z] shall have the reversion by survivor, but he shall not have the rent, because he claymeth in from the first feoffor, which is paramount the rent. (2) If there be two joyntenants in fee, and the one joyntenant granteth a rent charge out of his part, and after releaseth to his joynt companion and dyeth, he shall hold the land charged, for that he is out of the reason and cause let downe by *Littleton*, because he claymeth not by survivor, in as much as the release prevented the same. And of this opinion was *Littleton* himselfe [u] before the edition of his booke. But all men agree, that if *A. B.* and *C.* be joyntenants in fee, and *A.* chargeth his part, and then releaseth to *B.* and his heirs, and dyeth, that the [w] charge is good for ever; because in that case *B.* cannot be in from the first feoffor, because he hath

[s] 14. E. 4. 1. b.
18. E. 2.
briefe 830.
8. E. 2. entry 77.
18. E. 3. 28.
38. E. 3. 26.
8. H. 6. 25.
Vide 46. E. 3. 77.
35. H. 6. 39.
[r] Dier Mich.
2. & 3. Eliz. 187.
lib. 1. fol. 96.
Vide lib. 6.
fol. 78, 79.
(Post. 318 a.)
[u] 33 H. 6. 5. 2.
9. Eliz. Dyer
263.

[w] 37. H. 8.
tit. alienation
Br. 31.

(7) See also the reason given in Sect. 289.

(2) See post. Sect. 289.

(3) [See Note 67.]

(4) Acc. F. N. B. 219. B.

[185. a.]

(1) See Dy. 337. a.

Lib. 3. Cap. 3. Of Joyntenants. Sect. 287.

10. E. 4. 3. b.
40. E. 3. 41. b.
33. H. 6. 5.
22. H. 6. 42. b.
per Pole.
35. E. 3.
release 43.
33. E. 3.
avowry 195.
14. H. 8. 2. (6)
(Cro. Jam. 696.
Plowd. 198.
6. Co. 79. a.
8. Co. 145.
7. Co. 107. b.
Post. 233. b.)

hath a joynt companion at the time of the release made, and severall writs of præcipe must be brought against them. (5) And albeit the release of one joyntenant to the residue of the joyntenants makes no degree in supposition of law, neither is there any severall estate between them, but the estate of him that releaseth is as it were extinguished and drowned in their estate and possession, so as one præcipe lyeth against them, (7) yet shall they hold the land charged as is aforesaid. (6) As if tenant for life grant a rent charge, and after surrendreth his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet hee shall hold it charged. (8)

“ *Mes auterment est de parceners, car si sont deux parceners, &c.*”
This is to be intended as well of parceners by custome as of parceners by the common law; and here is implied the reason of the diversitie, for that the survivor doth claime above the charge, and the heire by descent under the charge. (9)

Sect. 287.

ITEM, si sont deux joyntenant sdes terres en fee simple deins un burgh, lou les terres et tenements sont devisables per testament, et si l'un de les dits deux joyntenants devise ceo que a luy affiert per son testament, &c. et morust, ceo devise est voide. Et la cause est, pur ceo que nul devise poit prendre effect mes apres la mort le devisor, et per sa mort tout la terre maintenant devient per la ley a son compaignon, que survivesquist, per le survivor; le quel il ne claime, ne ad riens en la terre per my le devisor, mes en son droit demesne per le survivor solonque le course de ley, &c. et pur cel cause tiel devise est voide. Mes auterment est de parceners seises des tenements devisables en tiel case de devise, &c. causâ quâ suprâ.
parceners seised of tenements devisable in like case of devise, &c. causâ quâ suprâ.

ALSO, if there bee two joyntenants of land in fee simple within a borough, where lands and tenements are devisable by testament, and if the one of the said two joyntenants deviseth that which to him belongeth by his testament, &c. and dieth, this devise is voide. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion, which surviveth, by the survivor; the which hee doth not claime, nor hath any thing in the land by the devisor, but in his owne right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of

“ *PER son testament, &c.*” Either in writing, or nuncupative, according to the custome.

“ *Et*

(5) As to the partial effect of such a release on the jointerancy, see post. Sect. 304.

(6) It should be 12. a.

(7) See the case of waste in Brownl. Rep. 238.

(8) Acc. 338. b. 233. b.

(9) In Calthrop's reading on Copyholds 64. the doctrine of admission on the death of copyholders being jointenants or parceners is stated according to this diversity.

[185. b.]

"*Et la cause est, pur ceo que nul devise poet prendre effect mes apres le mort le devisor (10) et per sa mort tout la terre maintenant devient per la ley a son compaignon, &c.*" Here both their claimes commence at one instant: and although an instant *est unum indivisibile tempore quod non est tempus nec pars temporis, ad quod tamen partes temporis connectuntur*, and that *instans est finis unius temporis et principium alterius*; (1) yet in consideration of law there is a prioritie of time in an instant, as here the survivor is preferred before the devise; for *Littleton* saith, that the cause is that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion. Whereby it appeareth, that *Littleton* by these words *post mortem et per mortem*, though they jump at one instant, yet alloweth priority of time in the instant which he distinguisheth by *per* and *post*. And the reason of this prioritie is, that the survivor claymeth by the first feoffor (as hath bin said) and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise void, and the rule of law is, that *jus accrescendi præfertur ultimæ voluntati*. (2)

Pl. Com. in Fulmerston's case.

(Plowd. 258. b. Ant. 30. a.)

Two fems joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattels reals are given to the husband, if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage the feme continued sole possessed; for, if the husband dyeth, the feme shall have it, and not the executors of the husband. (3) But otherwise it is of personall goods.

(Plowd. 418.

Hob. 3.

Cro. Eliz. 33.)

If a man be seised of a house, and possessed of divers heirlomes, that by custome have gone with the house from heire to heire, and by his will deviseth away the heirelomes, this devise is void; for, as *Littleton* here saith, the will taketh effect after his death, and by his death the heirlomes by ancient custome are vested in the heire (4), and the law preferreth the custome before the devise. And so it is if the lord ought to have a herriot when his tenant dieth, and the tenant deviseth away all his goods, yet the lord shall have his herriot for the reason aforesaid. And it hath been anciently said, that the herriot shall bee paid before the mortuary.

1. H. 5. executors 108.

[x] *Imprimis autem debet quilibet, qui testaverit, dominum suum de meliore re quam habuerit recognoscere, et postea ecclesiam de aliâ meliore, &c.* wherein the lord is preferred, for that the tenure is of him. This dutie to the lord is very antient; for in the lawes before the Conquest it is said, *si ve quis incuriâ, si ve morte repentinâ fuerit intestat' mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito* (6). In the Saxon tongue it is called *heregeat*, as much to say (as I take it) as the lord's [beste]; for *here* is lord, and *geat* is [beste]. But let us returne to *Littleton*.

[x] Fleta lib. 2. cap. 50. (5) Bracton lib. 2. fol. 60. Britton fol. 178.

Lamb. fol. 119. 58.

" Mes

(10) Acc. ant. 112. a. b. as a reason for the goodness of a devise by husband to wife.

[185. b.]

(1) [See Note 68.]

(2) Acc. as to goods, Office of Exec. ed. 1676. p. 26. Perk. sect. 526. Swinh. on Testam. part 3. sect. 6.

(3) See ant. 46. b. post. 351. a. and the case of a purchase by husband and wife jointly, the former being a villein, in 2. Ro. Abr. 733. D. pl. 2.

(4) Acc. ant. 18. b.

(5) It should be cap. 57.

(6) See this same passage cited ant. 176.

“ *Mes auterment est de parceners seises des tenements devisable en tiel cas del devise, &c. caulâ quâ suprà.* ”

The reason is evident, for that there is no survivour between coparceners, but the part of the one is descendible, and consequently may be devised.

Sect. 288.

[186. a.]

ITEM, il est comunement dit, que chescun joyntenant est seisie de la terre qu'il tient joyntment (1) per my et per tout; et ceo est autant a dire, qu'il est seisie per chescun parcel et per tout, &c. et ceo est voier, car en chescun parcel, et per chescun parcel, et per tous les terres et tenements, il est joyntment seisie ovesque son compaignon. (2)

AL S O, it is commonly said, that every jointenant is seized of the land which hee holdeth joyntly per my et per tout; and this is as much to say, as he is seized by every parcell and by the whole, &c. and this is true, for in every parcell, and by every parcell, and by al the lands and tenements, he is joyntly seized with his companion.

Vide Sect. 697. “ **I**TEM, est communement dit, &c.” That is, it is the common opinion, and *communis opinio* is of good authoritie in law. *A communi observantiâ non est recedendum*, (3) which appeareth here by Littleton.

(Post 350. a. 2. Co. 66. b. 2. Ro. Abr. 86.) Vide Bracton lib. 5. fo 430. Britton cap. 35. Fleta lib. 3. cap. 4. 40. E. 3. 40. 18. E. 2. bre. 831. 35. H. 6. 39. “ *Per my et per tout.* ” Et sic totum tenet et nihil tenet, scil. totum conjunctim, et nihil per se separatim. And albeit they are so seized (as for example, where there be two joyntenants in fee) yet to divers purposes each of them hath but a right to a moitie; as to enfeoffe give or demise, or to forfeit (4) or lose by default in a *præcipe*. (5) If my villein [y] and another purchase lands to them two and their heires, I may enter into a moity. Vide the second part of the institutes upon the 6. chapter of the statute de bigamis. Fleta lib. 1. cap. 28. 40. Aff. 79. 48. E. 3. 16. [y] Vid. 6. E. 3. 47. 7. E. 4. 29. 11. El. Dyer 183. (2. Co. 58. a. Cro. Jam. 91. 1. Leon. 47.)

And where all the joyntenants joyne in a feoffment, every of them in judgment of law doth give but his part. (6) If an alien and a subject purchase lands joyntly, the king upon office found shall have but a moity. (7) And Littleton afterwards in this Chapter (8) saith, that one joyntenant hath one moity in law, and the other the other moity. And therefore if two joyntenants be [z] and both they make a feoffment in fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moitie, because no more in judgment of law passed from him: (9) and so it is of a gift in taile or a lease for life, &c.

Yet

(1) &c. in L. & M. & Roh.
(2) &c. in L. & M. & Roh.
(3) [See Note 69.]
(4) Acc. as to copyholders being jointenants Calthrope's Reading 97. Kitch. French ed. 82. a.
(5) See ant. 125. b.
(6) Acc. 11. H. 7. a. pl. 5.

(7) See ant. 180. and note 2. there.
(8) Post. Sect. 291.
(9) See ant. 47. a. & post 214. a. the case of a lease by two jointenants with reservation of rent to one, and the difference there taken between such a lease, by *parol* and one by *deed indented*. See also Dy. 263. a.

Yet every joyntenant may warrant the whole; [a] because a man may warrant more then passeth from him. (10)

If two joyntenants make a feoffment in fee [b] and one of the feoffors dye, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part; but otherwise it is on the part of the feoffees, as hath beene said before.

And where two joyntenants be, the one of them [c] may make the other his baylife of his moiety, and have an action of account (11) against him. And one joyntenant [d] may let his part for yeares or at will to his companion.

If two joyntenants be of certaine lands, and the one of them by deed indented [e] bargaineth and selleth the lands, and the other joyntenant dyeth, and then the deed is inrolled, there shall passe nothing but the moiety which the bargainor had at the time of the bargain. (12)

(Cro. Cha. 217. 569.

[a] Vide the second part of the Institutes upon the 6. chapter of the statute of bigamis.

[b] 14. E. 4. 5. and the other bookes above-said.

[c] 21. E. 3. 60. (Post. 200. b.)

[d] 11. H. 3. 60. 33. (Post. 193. b.)

335. a.)

[e] 6. E. 6. tit. Faits inroll.

9. Br.

1. Co. 173.)

Sect. 289.

ITEM, si deux joynt-tenants sont seises de certain terres en fee simple, et l'un lessa ceo que a luy affiert a un estranger pur terme de 40 ans, et devie devant le term commence, ou deins le terme, en cest case apres son decease le lessee poet enter et occuper la moitie a luy lessé durant le terme, &c. coment que le lessee n'avoit unques possession de ceo en la vie le lessor, per force de mesme le lease, &c. Et le diversitie perenter le case de grant de rent charge (1) [avantdit, et cest case, est ceo. Car en grant de rent charge per] joyntenaunt, &c. les tenements demurgent tous foits come ils fueront adevant, sans ceo, que ascun ad ascun droit d'aver ascun parcell de les tenements forsque eux mesmes, et les tenements sont en tiel plyte come ils fueront devant le charge, &c. Mes ou lease est fait per un joyntenant a un auter pur terme des ans, &c. maintenaunt per force de le lease le lessee ad droit en mesme la terre, c'est a sçavoir, de tout ceo que a son lessor affiert, et d'aver ceo per force de mesme

AL S O, if two joyntenants be seised of certain lands in fee simple, and the one letteth that to him belongeth to a stranger for terme of forty yeares, and dyeth before the term beginneth, or within the terme, in this case after his decease the lessee may enter and occupie the moitie let unto him during the terme, &c. although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. And the diversitie betweene the case of a grant of a rent charge aforesaid, and this case, is this. For in the grant of a rent charge by a joyntenant, &c. the tenements remaine alwayes as they were before, without this, that any hath any right to have any parcell of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joyntenant to another for terme of yeares, &c. presently by force of the lease the lessee hath right in the same land,

(10) See post. Sect. 700.

(11) See ant. 172. a.

(12) See ant. 147. b.

[186. b.]

(1) The following words between brackets not in L. & M. nor Roh.

mesme le lease durant son terme. (2)
Et ceo est la diverfitie. (3)

land, (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his terme. And this is the diverfitie.

“*PER force de mesme le dit lease, &c.*”

[f] Vid. Sect.
 286. & 660. &
 Sect. 2.

(Dy. 187. a.
 2. Ro. Abr. 89.
 [g] 11. H. 4. 90.
 14. H. 8. 6.
 17. E. 4. 6. a.
 9. H. 6. 52.
 21. H. 7. 29.
 14. H. 7. 4.
 Aff. 422.)

By this &c. is implied, [f] that where our author speaketh of joyntenants seised in fee, that so it is if two be seised for life, and one make a lease to begin presently or *in futuro*, and dieth, this lease shall binde the survivor, as it hath been adjudged. (4) [g] And if one joyntenant grant *vesturam terræ*, or *herbagium terræ*, for yeares, and dieth, this ~~shall binde the survivor~~; for such a lessee hath right in the land. So it is if two joyntenants be of a water, and the one granterh the severall pischary.

18. E. 3. execution 56. 11. El. Dy. 285. Plow. Com. 160. a. Temps E. 1.
 20. H. 6. 4. 7. H. 7. 13. 10. H. 7. 24. (Ant. 4. b.)

[b] 6. E. 3.
 38, 39. 52.
 7. E. 3. 20, 21.
 17. E. 3. 37. b.
 22. E. 3. 9.
 30. E. 3. 16.
 11. H. 4. 54.
 15. E. 3. Dar.
 presentment 11.
 10. E. 4. 94.
 1. H. 7. 1. b.
 2. R. 3. Quar. Imp. 102. 9. El. Dy. 259. 36. H. 8. Br. present. 27. H. 8. fo. 11. 5. H. 7. 8.
 6. E. 4. 10. b. Doct. & Stud. 116. 34. H. 6. 40. 20. E. 3. Quar. Imp. 63. F. N. B. 34. V.
 (2. Ro. Abr. 355.)

“*L'un lessa,*” The one letteth. If two joyntenants bee of an advowson, and [b] the one presenteth to the church, and his clerke is admitted and instituted, this in respect of the privy shall not put the other out of possession; (5) but if that joyntenant that presenteth dieth, it shal serve for a title in a *quare impedit* brought by the survivor. (6) But yet if one joyntenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unlesse they joyn in presentation, and after the fixe moneths he may in that case present by lapse (7).

[i] Bract. li. 4.
 fo. 238. 245. 247.
 Brit. fo. 223.
 45. Ed. 3. Fines
 41. 18. E. 2.
 Quar. Imp. 176.
 38. H. 6. 9.
 19. E. 3. ib. 50.
 5. H. 5. 10.
 F. N. B. 34. V.
 (Plowd. 332. b.
 333. a. 10. Co.
 135. b. 2. Ro.
 Abr. 346.)

But if two or more coparceners bee, [i] and they cannot agree to present, the eldest shall present; and if her siter doth disturbe her, she shall have a *quare impedit* against her; and so shall the issue and the assignee of the eldest, and yet he is tenant in common with the youngest. (8) And in the same manner the tenant by the curtesie of the eldest shall present. But if there bee foure coparceners, and the eldest and the second present, and the other two present joyntly or severally, the ordinary may refuse them all; for the eldest did not present alone, but she and one other of her sisters. But now let us returne to *Littleton*. (9)

F. N. B. 33. E. Ant. 166. b. Post. 243. a. & Sect. 299.)

(2) *Vie* instead of *terme* in L. & M. & Roh.

(3) &c. in L. & M. & Roh

(4) See acc. Cro. Jam. 91. & 2. Brownl.

375.

(5) See post. 243. a. 249. a.

(6) [See Note 70.]

(7) See 5. H. 7. 8. a. Burn. Ecc. L. tit.

advowson Watf. Compl. Incumb. c. 8.

(8) See my note on this subject ant. 166. b. Hob. 119. Dy. 55. a.

(9) See further on presentation where more than one have an interest in an advowson, 2. Gibf. Cod. 11th ed. 804. ant. 17. b. 18. a. 17. Vin. Abr. 325. Mallory's *Quare Impedit* 714 to 75.

[187. a.]

Sect. 290.

ITEM, joyntenants (s'ils voilent) poient faire partition enter eux, et la partition est assés bon; mes de ceo faire ils ne ferront compels per la ley; mes s'ils voilent faire partition de leur proper volunt et agreement, le partition estoiera en sa force.

AL SO, joyntenants (if they will) may make partition betweene them, and the partition is good enough; but they shall not bee compelled to doe this by the law; but if they will make partition of their own will and agreement, the partition shal stand in force.

“**P**OYENT faire partition.” But this partition must bee [k] by deed, as hath beene said before. But joyntenants for yeares may [l] make partition without deed.

(Post. 198. b.)
[k] Vid. Sect. 259. 318.
(Ant. 169. a. F. N. B. 62. f.)
[l] 18. El. Dyer 350.
F. N. B. 62. b.

“*Ils ne serra compell.*” This is true regularly; but, by the custome of some cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the custome, to make partition. (1) But since *Littleton* wrote jointenants and tenants in common generally are compellable to make partition by writ framed upon the statutes [m] of 31. & 32. H. 8. as before hath been said. (2) And albeit they be now compellable to make partition, yet seeing they are compellable by writ, they must pursue the statutes, and cannot make partition by parol, for that remaines at the common law. And by *Littleton's* authoritie herein it seemeth to me, that if one joyntenant or tenant in common disseise another, and the disseisee bring his assise for the moytie, that in this case, though the plaintife prayeth it, yet no judgement shall bee given to hold in severaltie, for then at the common law there might have beene by compulsion of law a partition between joyntenants and tenants in common, and by rule of law the plaintife must have judgement according to his plaint or demand.

[m] 31. H. 8. ca. 1. 32. H. 8. ca. 32. Vid. Sect. 264. 247. 259. Mich. 16. & 17. El. 1. 340. inter Harris & Eden adjudge. acc. 18. El. Dyer 350. b. Vide before in the Chapter of Partition, many bookes cited concerning this matter.
(Ant. 175. a. Sect. 250. Mo. 29. Dy. 350. Ant. 167. b.)
3. E. 3. 48.

If two joyntenants be [n] of land with warranty, and they make partition by writing, the warrantie is destroyed; but if they make partition by writ of partition upon the statute, the warrantie remaines, because they are compellable thereunto. (3)

F. N. B. 9. b. 7. Aff. 10. 7. E. 3. 29. 10. Aff. 17. 10. E. 3. 40. 43. 12. Aff. 15. 17. 12. E. 3. judgement 102. 20. E. 3. Aff. 62. 28. Aff. 35. 23. Aff. 10. 7. H. 6. 4. 19. H. 6. 45. 3. E. 4. 10. Vid. Sect. 247. Brit. fo. 112. lib. 6. fo. 12. & 13. Morrice's case. [n] 29. E. 3. tit. Garr.

(1) For instances of such custom, see for London F. N. B. 62. b. and for gavelkind land ant. Sect. 265. and Robins. on Gavelk. 108.

(2) [See Note 71.]

(3) Acc. ant. 165. a. and b. as to parceners, because they are compellable to make partition at common law. See the case of aid between parceners after partition, ant. 474. a. and b.

Sect. 291.

ITEM, si un joynt estate soit fait de terre a le baron et a sa feme et a un tierce person, en ceo cas le baron et sa feme n'ont en ley en leur droit forsque le moitie, &c. (4) [et le tierce person avera tant come le baron et sa feme ont, scil. l'auter moitie, &c.] Et la cause est, pur ceo que le baron et sa feme ne sont forsque un person en ley, et sont en semblable case sicome estate soit fait a deux joyntenants, ou l'un ad per force de joynture l'un moitie en ley, et l'auter, l'auter moitie, &c. (1) En mesme le maner est lou estate est fait a le baron et a sa feme et as auters deux homes, en tel cas le baron et sa feme n'ont forsque la tierce part, et les auters deux homes les auters deux parts, &c. causa qua supra.

AL S O, if a joynt estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moitie, and the third person shall have as much as the husband and wife, viz. the other moitie, &c. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two jointenants, where the one hath by force of the joynture the one moitie in law, and the other, the other moitie, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. causa qua supra.

PL U I S serra dit del matter touchant joyntencie, en le Chapter de Tenants en Common, et Tenant per Elegit, et Tenant per Statute Merchant.

MO R E shall be said of the matter touching jointenancy, in the Chapter of Tenants in Common, and Tenant by Elegit, and Tenant by Statute Merchant.

(Post. 299. b. 351. a. 2. Co. 68.)

[6] Mich. 33. E. 3. coram rege Salop. in Thesaur.

(Post. 326. a. 1. Ro. Abr. 388, 389. 9. Co. 136.)

“ L E baron et sa feme n'ont en ley en leur droit forsque le moitie, &c.” William Ode and Jeane his wife [6] purchased lands to them two and their heires; after William Ode was attainted of high treason for the murder of the king's father E. 2. and was executed; Joan his wife survived him; E. 3. granted the lands to Stephen de Bitterly and his heires: John Hawkins the heire of the said Joan in a petition to the king discloseth this whole matter, and upon a scire facias against the patentee hath judgement to recover the lands, for the reason here yeilded by our author.

[187. b.]

Vide Sect. 665.

But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities between them, which is implied in these words of our author, baron et sa feme. (2)

“ Forsque

(4) The words following between brackets not in L. and M. nor Rob.

[187. b.]

(1) No &c. in L. and M. nor Rob.

(2) See acc. as to this difference between joint estate to husband and wife before

marriage and one after, Calthrop's Read. on Copyh. 91. F. N. B. 194. B. See further case of Butler and Baker 7. Co. the case of Margery More ant. 133. a. the case of 4. All. 4. cited in 1. Ro. Abr. 271. and the case of Ward and Walthew Yelv. 101.

"*Forſque un perſon en ley.*" *Bract.* ſaith [p] *vir et uxor ſunt quaſi unica perſona, quia caro una et ſanguis unus.* (3) It hath bin ſaid, that if a reverſion bee granted to a man and a woman and their heires, and before attornment they entermarrie, and then attornment is made, that the husband and wife ſhall have no moities in this caſe, (4) no more than if a charter of feoffment be made to a man and a woman, with a letter of attornie to make livery, they entermarry, and then liverie is made ſecundum formam chartæ, in which caſe it is ſaid that they have no moities. But certain it is, that if a feoffment were made before the ſtat. of 27. H. 8. of uſes to the uſe of a man [q] and a woman, and their heirs, and they entermarry, and then the ſtatute is made, if the husband alien it is good for a moiety; for the ſtatute executes the poſſeſſion according to ſuch qualitie, manner, forme, and condition, as they had in the uſe, ſo as though it veſt during the coverture, yet the act of parliament executes ſeverall moities in them, ſeeing they had ſeverall moities in the uſe. (5)

[p] *Bract.* li. 5. fo. 416. 20. H. 3. Diſcent 52. lib. 4. fo. 68. *Toker's caſe.* *Pl. Com.* 483. *Nichols caſe.*

[q] 4. Mar. *Dyer* 149. 3. Mar. *Dyer* 122. 29. H. 8. *Dyer* 32.

If an eſtate be made to a villeine and his wife [r] being free, and to their heires, albeit they have ſeverall capacities, viz. the villeine to purchaſe for the benefit of the lord, and the wife for her owne, yet if the lord of the villeine enter, and the wife ſurviveth her husband, ſhe ſhal enjoy the whole land, becauſe there be no moities betweene them.

[r] 40. *Aſſ.* p. 7.

A man makes a leaſe to A. and to a baron and feme, viz. to A. for life, to the husband in taile, and to the feme for yeares, in this caſe it is ſaid, that each of them hath a third part in reſpect of the ſeveraltie of their eſtates.

If a feoffment be made to a man and a woman and their heires with warrantie, [s] and they entermarrie, and after are impleaded and vouch and recover in value, moities ſhall not be betweene them; for though they were ſole when the warrantie was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moities.

[s] *Pl. Com.* 483. *Nichols caſe.*

Albeit baron and feme (as *Littleton* here ſaith) be one perſon in law, ſo as neither of them can give any eſtate or intereſt to the other, (6) yet if a charter of feoffment bee made to the wife, the husband as attorney to the feoffor may make liverie to the wife; (7) and ſo a feme covert, that hath power to ſell land by will, may ſell the ſame to her husband, becauſe they are but instruments for others, and the ſtate paſſeth from the feoffor or deviſor.

10. H. 7. 20.

If a husband, wife, and a third perſon purchaſe lands to them and their heires [t] and the husband before the ſtatute of 32. H. 8. cap. 1. had aliened the whole land to a ſtranger in fee, and died, the wife and the other joyntenant were joyntenants of the right, and

[t] 11. E. 3. cui in vita 9. 16. E. 3. ibid. 36 E. 3. ib. 20. F. N. B. 193. k.

35. *Aſſ.* pl. 15. 31. H. 6. tit. Ent. congeable 54. 19. H. 6. 45.

if

(3) See ant. 112. a. where the ſame paſſage from *Bracton* is cited.

299. b.

(4) See acc. poſt. 310. a. and there the doctrine is more poſitively expreſſed. See further the caſe of a leaſe for life to baron and feme and afterwards Confirmation, poſt.

(5) See *Dy.* 200. a.

(6) Acc. ant. 112. a. and obſerve note 6. there.

(7) Acc. ant. 52. a.

if the wife had died, the other joyntenant should have had the whole right by survivor (1); for that they might have joynd in a writ of right (2), and the discontinuance should not have barred the entrie of the survivor, for that he claymed not under the discontinuance, but by the title paramount above the same by the first feoffement (3), which is worthie of observation. But if the husband had made a feoffment in fee but of the moiety, and he and his wife had dyed, their moiety should not have survived to the other. [188. a.]

And for the better understanding of this diversity divers things are worthy of observation.

Vide Sect. 302.
(Post. 327. b.)

First, that a right of action and a right of entrie may stand in joynture; for at the common law the alienation of the husband was a discontinuance to the wife of the one moiety, and a disseisin of the other, so as after the death of the husband, the wife hath a right of action to the one moiety, and the other joyntenant a right of entrie into the other, but they are jointenants of the right, because they may joyne in a writ of right.

* Vide the statute of 32. H. 8.
2. It is no discontinuance at this day.

Secondly, that a right of action or a bare right of entrie cannot stand in joynture with a freehold or inheritance in possession, and therefore if the husband make a feoffment of the moiety, this was a discontinuance of that moiety, * and the other jointenant remained in possession of the freehold and inheritance of the other moiety, which for the time was a severance of the jointure (4); and so are all the bookes, which seemed to varie amongst themselves, cleerely reconciled.

[u] Pl. Com.
419. Bratch-
bridges case.

If two joyntenants be of a rent, and the one of them disseise the tenant of the land, [u] this is a severance of the joynture for a time; for the moiety of the rent is suspended by unitie of possession (5), and therefore cannot stand in joynture with the other moiety in possession. And this is to be observed, that there shall never bee any survivor, unlesse the thing be in joynture at the instant of the death of him that first dyeth: (6) for the rule is, *nihil de re accrescit ei, qui nihil in re quando jus accresceret habet*.

46. E. 3. 21.
19. H. 6. 45.
37. H. 8. 8.
3. E. 4. 10.

Also if a man demiseth lands to two, to have and to hold to the one for life, and the other for yeares, they are no joyntenants; for a state of freehold cannot stand in joynture with a terme for yeares: and a reversion upon a freehold cannot stand in joynture with a freehold and inheritance in possession, as shall be said in the next Chapter (7). Neither can a feisin in the right of a politique capacity stand in joynture with feisin in a natural capacity, as shall be said hereafter (8).

If two femes be joyntly seised, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have severall writs of *cui in vitâ* at their election; but when they have recovered in those severall writs, they shall be joyntenants againe. But if the barons had aliened severally, this had bin a severance of the joynture for a time, for the reason abovesaid.

If two joyntenants, the one for life, and the other in fee, lose by default, the one shall have a writ of right, and the other a *quod ei deferreat*; and yet when they have severally recovered, they shall be joyntenants

(1) Acc. 2. Ro. Abr. 88. D. pl. 3.
(2) See post. 337. a.
(3) See post. 364. b. and ant. 185. a.
(4) Acc. post. 337. b.

(5) See ant. 148. b.
(6) Acc. post. 193. a.
(7) Post. Sect. 302. near the end.
(8) Post. Sect. 297.

joyntenants againe (9). So it is if two joyntenants bee disseised, and an assise is brought, and the one is summoned and severed, and the other recover the moitie, and after another assise is brought, and he that recovereth is summoned and severed, and the other recover, albeit they severally recover, yet they are joyntenants againe (10).

And in all cases where the joyntenants pursue one joynt remedy, and the one is summoned and severed and the other recover, he that is summoned and severed shall enter with him; but where their remedies be severall, there the one shall not enter with the other, till both have recovered: and the same law is of coparceners. If lands [*w*] be demised for life, the remainder to the right heires of *I. S.* and of *I. N.* *I. S.* hath issue and dieth, and after *I. N.* hath issue and dieth, the issues are not joyntenants, because the one moiety vested at one time, and the other moiety vested at another time (11). And yet in some cases there may be joyntenants, and yet the estate may vest in them at severall times.

If a man [*x*] make a feoffment in fee to the use of himselfe and of such wife as he should afterwards marrie, for terme of their lives, and after he taketh wife, they are joyntenants, and yet they come to their estates at severall times (13).

And so it is if I disseise one to the use of two, and the one agrees at one time, and the other at another, yet they are joyntenants.

In this Section are three *Ec.* The first and second are at large explained before; the last is intended where more parties take then three.

(9) See post. 214. a. and Bro. Abr. *jointenants* 6.

(10) A like case of parceners is stated before, and resolved in the same way. Ant. 164. a. See further 19. H. 6. 45. b.

(11) For other cases, where *joint* words are construed to operate *severally* for the

like reason, see the arguments in mr. justice Windham's case, 5. Co. 7. a.

(12) It is in Dy. 339. b. pl. 48. but without any name. It is also much at large in 2. Leon. 14.

(13) [See Note 72.]

Vid. Lit. cap. Remitter, the last case. (Post. 364. b.) 10. H. 6. 10. 31. H. 6. tit. Entre congeable. 46. E. 3. 21. b. 3. E. 4. 10. 37. H. 6. 8. [*w*] 24. E. 3. 29. 18. E. 3. 28. 38. E. 3. (Cro. Jam. 259.) [*x*] 17. El. Dyer Brent's case (12)

TENANTS en Common sont ceux, que ont terres ou tenements en fee simple, fee taile, ou per terme de vie, &c. les queux ont tielx terres ou tenements per severall titles, et n. my per joint title, et nul de eux sçavoit de ceo son severall; mes ils doivent per la ley occuper tiels terres ou tenements en common, et pro indiviso a prendre les profits en common. Et pur ceo que ils avientront a tielx terres ou tenements per severall titles, et nemy per un joynt title, et leur occupation et possession sera per la ley perenter eux en common, ils sont appels tenaunts en common. Si come un home enfeoffa deux joyntenants en fee, et l'un de eux alien ceo que a luy afferit a un autre en fee, ore le alienee et l'auter joyntenant sont tenants en common; pur ceo que ils sont eins en tiels tenements per severall titles, car l'alienee vient eins en la moitie per la feoffement d'un des joyntenants, et l'auter joyntenant ad l'auter moitie per force de la primer feoffment fait a luy et a son compagnon, &c. (1). Et issint ils sont eins per severall titles, c'est-à-savoir, per severall feoffements, &c. (2)

TENANTS in Common are they, which have lands or tenements in fee simple, fee taile, or for terme of life, &c. and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joynt title, and their occupation and possession shall be by law betweene them in common, they are called tenants in common. As if a man infeoffe two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; because they are in such tenements by severall titles, for the alienee cometh to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffement made to him and to his companion, &c. And so they are in by severall titles, that is to say, by severall feoffements, &c.

Flet. li. 3. ca. 4. **L**ITTLETON having spoken of parceners, which are onely by descent, and of joyntenants, which are onely by purchase and by joint title, speaketh now of tenants in common, which may be by three meanes, viz. by purchase, by descent, or by prescription, as hereafter in this Chapter shall appeare (3).

“ Ou pur terme de vie, &c.” Here &c. implyeth pur terme d'auter vie, or for term of yeares, or for any other fixed estate in the land. [189. a.]

And here it appeareth, that the essential difference betweene joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, (1) and tenants in common

(1) No &c. in L. & M. nor Rob.

(2) No &c. in L. & M. nor Rob.

(3) See Sect. 310. which gives an instance of tenancy in common by prescription.

[189. a.]

(1) See post. 299. b. the first line.

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mon by severall titles, or by one title and by severall rights ; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie is common to them both, viz. that their occupation is individed, and neither of them knoweth his part in severall. Vide Sect. 296.

The example that *Littleton* putteth in this Section is perspicuous, and needeth no explication.

Sect. 293.

(Ant. 1. b.
11. Co. 38.)

ET est asçavoir, que quant il est dit en ascun livre que home est seisie en fee, sauns plus dire, il serra entendue en fee simple; car il ne serra entendue per tiel paroll (en fee) que home est seisie en fee taile, sinon que soit mis a ceo tiel addition, fee tayle, &c.

AND it is to bee understood, that when it is said in any booke that a man is seised in fee, without more saying, it shall bee intended in fee simple; for it shall not bee intended by this word (in fee) that a man is seised in fee tayle, unlesse there bee added to it this addition, fee tayle, &c.

THIS is evident, and *secundum excellentiam* it shall be taken for the highest and best fee, and that is fee simple. Vide devant Sect. 99.
(Ant. 73. a.)

“Addition, fee tayle, &c.” Here is implied a maxime in law, viz. that *additio probat minoritatem*, as it is vulgarly said, the younger sonne giveth the difference. (2)

Sect. 294.

ITEM, si trois joyntenants sont, et un de eux alien ceo que a luy affiert a un auter home en fee, en cest cas l'aliennee est tenant en common ovesque les auters deux joyntenants; mes uncore les auters deux joyntenants sont seises des deux parts joyntment que remayne (3), et de ceux deux parts le survivor enter eux deux tient lieu, &c. (4)

ALSO, if three joyntenants bee, and one of them alien that which to him belongeth to another man in fee, in this case the aliennee is tenant in common with the other two joyntenants; but yet the other two joyntenants are seised of the two parts which remain joyntly (5), and of these two parts the survivor between them two holdeth place, &c.

THIS needeth no explication, onely the &c. in the end of this Section implyeth, that the same law is where there be more joyntenants than three.

(2) The difference of arms is meant. See Roh.
more particularly as to this ant. 140. b.

(3) *Que remayne* not in L. & M. nor

(4) No &c. in L. and M. nor Roh.

(5) See Sect. 304. & 312.

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which cannot stand in joynture with the seisin of the subject in his naturall capacite. So likewise if there be two joyntenants, and the crowne descend to one of them, the joynture is severed, and they are become tenants in common. But if lands be given to *A. de B.* bishop of *N.* and to a secular man, to have and to hold to them two and to their heires, in this case they are joyntenants; for each of them take the lands in their naturall capacite.

[Post. 310. b. 2. Ro. Abr. 91. [d] 13. H. 8. 14. 16. H. 7. 15. 9. H. 6. 25. 45. E. 3. 25.] If lands be given to *John* bishop of *Norwich* and his successors and to *John Overall* doctor of divinity and his heires, being one and the same person, he is tenant in common [d] with himselfe. But our author's rules doe not hold in chattels reals or personals; for if a lease for yeares be made or a ward granted to an abbot and a secular man, or to a bishop and a secular man, or if goods be granted to them, they are joyntenants, because they take not in their politique capacity. (2)

Sect. 298. (1)

[190. b.]

ITEM, si terres soient dones a deux a aver et tener, scil. l'un moitie a l'un et a ses heires, et l'auter moity a l'auter et a ses heires, ils sont tenants en common.

AL SO if lands bee given to two to have and to hold, scil. the one moity to the one and to his heires, and the other moity to the other and to his heires, they are tenants in common.

(Cro. Cha. 75. Ant. 183. a. b.) **A**ND the reason is, because they have severall freeholds and an occupation *pro indiviso*.

(2. Ro. Abr. 89, 90. Ant. 183. b.) Here is to bee observed, that the *habendum* doth sever the premises that *primâ facie* seemed to be joynt; for an expresse estate controlls an implied estate as hath beene said.

Sect. 299.

ITEM, si home seisse de certaine terres enseoffia un auter de le moitie de mesme la terre sans ascun par lance de assignement ou limitation de mesme la moitie en severaltie al temps del seoffment, donques le seoffce et le seoffor tiendront lour parts de la terre en common.

AL SO, if a man seised of certaine lands infeoffe another of the moitie of the same land without any speech of assignement or limitation of the same moity in severaltie at the time of the seoffment, then the seoffee and the seoffor shall hold their parts of the land in common (2).

11. Aff. pl. 16. 45. E. 3. 12. 44. Aff. 11. **A**ND the like law is, if the seoffment bee made of a third part or a fourth part, &c. And if there be an advowson appendant, they are also tenants in common of the advowson. (3) And alibit

(2) [See Note 75.]

[190. b.]

(1) In L. and M. and Roh. this Section is placed immediately after Sect. 300.

(2) Brooke in his Abridgment title *seoffe-*

ments de terres pl. 75. cites this Section of Littleton, and in support of it refers to various cases in Fitzherbert's Abridgment. see further Bro. Nouv. Cas. 154. 124. 6. Co. 1. and Dy. 187. a. pl. 5.

(3) See post. 307. a.

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albeit it is said, that such a feoffment of a moitie or third part, &c. is not good without writing, for that (as they say) a man cannot create an uncertain estate in land by parol; yet is the law cleere, that such a feoffment is good by parol without writing, and such an uncertaine estate shall passe by livery, and so it appeareth in our bookes.

If a verdict finde, that a man hath *duas partes manerii*, &c. in *tres partes divisas*, this shall not be intended to be in common; but if the verdict bee in *tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict. (4)

But if a man be seised of a manor whereunto an advowson is appendant, and maketh a feoffment of three acres parcell of the manor together with the advowson to two, to have and to hold the one moiety together with the moitie of the advowson to the one and his heires, and the other moiety together with the other moiety of the advowson to the other and his heires, this cannot bee good without deed; for the feoffor cannot annex the advowson to these three acres, and disannex it from the rest of the manor, without deed. (5)

33. H. 6. 5. a. (Post. 333. b. Cro. Cha. 433. Cro. Jam. 15.)

21. E. 4. 22. b.
5. E. 3. 23. 67.
Temps E. 1.
Feoffments 115.
34. E. 1. quar.
imped. 179.
10. Eliz Dyer 28.
22. E. 3. 6.
Feoffments 116.
6. E. 3. 50.
39. E. 3. 38.
9. E. 3. 16.
17. E. 3. 3.
18. E. 3. 43.
43. E. 3. 26.
23. Aff. 8.

Sect. 300.

*ET est asçavoir, que en mesme le maner come est avantdit de tenants en common, de terres ou tenements en fee simple, ou en fee taile, en mesme le maner poit estre de tenants a terme de vie. Sicome deux joyntenants sont en fee, et l'un lessa a un home ceo que a luy affiert pur terme de vie, et l'auter joyntenant lessa ceo que a luy affiert a un auter pur terme de vie, &c. les deux lesses sont tenants en common pur leur vies, &c. **

AND it is to bee understood, that in the same manner as is afore-said of tenants in common, of lands or tenements in fee simple, or in fee taile, in the same manner may it be of tenants for terme of life. As if two joyntenants bee in fee, and the one letteth to one man that which to him belongeth for terme of life, and the other joyntenant letteth that which to him belongeth to another for terme of life, &c. the said two lessees are tenants in common for their lives, &c.

Vid. Sect. 295. where this is sufficiently explained before.

Sect. 301.

ITEM si home lessa terres a deux homes pur terme de leur vies, & l'un granta tout son estate de ceo que a luy affiert a un auter, donques l'auter tenant a terme de vie, et † celui a que le

ALSO if a man let lands to two men for terme of their lives, & the one grants all his estate of that which belongeth to him to another, then the other tenant for terme of life,

(4) [See Note 76.]

(5) Besides the references in the margin, see Dy. 48. b. pl. 3. and Dodridge on Advowsons 30.

[191. a.]

† [At this page Mr. BUTLER's notes commence. See Note 77.]

* &c. not in L. and M. or Roh.

† *Alesine* added L. and M. but not in Roh.

le graunt est fait sont tenants en common, durant le temps que ambideux les lessées sont en vie.

Et memorandum, que en tous † auters tiels cases, coment que ne sont icy expressement moves ou specifies, si sont en semblable reason, sont en || semblable ley.

(2. Roll. Abr. 89, 90. 11. Rep. 84. b.)

3c. Aff. 18.

(A. Rep. 72. b. 2. Cro. 378. 417. 696.)

(Post. 205. a. Hob. 170. 203.)

AND so it is if lands bee letten to two for terme of their lives, *et eorum alterius diutius viventi* (1), and one of them granteth his part to a stranger, whereby the joynture is severed, and dyeth, here shall bee no survivour, but the lessor shall enter into the moiety, and the survivour shall have no advantage of these words, *et eorum alterius diutius viventi*, for two causes. First, for that the joynture is severed. Secondly, for that those words are no more then the Common Law would have implied without them, and *expressio eorum quæ tacitè insunt nihil operatur*. Hereby it appeareth that in case of leases for life it is more beneficiall for the lessor to have the joynture severed then to have it continue.

Vid. Sect. 1.

“*Si soient en semblable reason sont en semblable ley.*” Here Littleton citeth one of the Maximes of the Common Law. That wherefoever there is the like reason, there is the like law. *Ubi eadem ratio, ibi idem jus*; or *ubi eadem ratio, ibi idem jus esse debet*; for *ratio est anima legis*. And therefore *ratio potest allegari deficiente lege*. But it must be *ratio vera et legalis et non apparens*. And here it appeareth that *argumentum à simili* is good in law. *Sed similitudo legalis est casuum diversorum inter se collatorum similis ratio, quod in uno similitum valet, valebit in altero, dissimilium dissimilis est ratio.*

IT E M* *si deux joyntenants en fee sont, et l'un lessa ceo que a luy affiert a un auter pur terme de sa vie, le tenant a terme de vie durant sa vie, et l'auter joyntenaunt que ne lessa pas, sont tenants en common. Et sur ceo case un question puit surder; † si come en tiel case mittomus que le lessor ad issiue et devie vivant l'auter joyntenant son companion, et vivant le tenant a terme de vie, le question poet estre tiel: Si le reversion de la moitie † que le lessor avoit descendra al issiue le lessor, ou que l'auter joyntenant*

AL S O if there bee two joyntenants in fee, and the one letteth that to him belongeth to another for terme of his life, the tenant for term of life during his life, and the other jointenant which did not let, are tenants in common. And upon this case a question may arise; as in such case admit that the lessor hath issiue and die, living the other joyntenant his companion, and living the tenant for life, the question may be this, Whether the reversion of the moiety which

[191. b.]

† les added in L. and M. but not in Roh.

‡ Semble L. and M. and Roh.

(1) [See Note 78.]

* Si deux not in Roh. but in L. and M.

† Si not in L. and M. or Roh.

‡ &c. added in L. and M. and Roh.

joyntenant avera ¶ cel reversion per le survivor? Ascuns ont dit en cest case, que l'auter joyntenant avera cel reversion per le survivor: et leur reason est tiel, scilicet que quant les joyntenants fueront joyntment seises § en fee simple, &c. coment que l'un de eux fist estate de ceo que a luy affiert pur terme de ¶ sa vie, et coment que il ad sever le franktenement de ceo que a luy affiert per le lease, uncore il n'ad sever le fee simple, mes le fee simple demurt a eux joyntment come il fuyt adevant. Et issint semble a eux, que l'auter joyntenant que survesquist, avera le reversion per le survivor, &c. Et auters ont dit le contrarie, & ceo est leur reason, scilicet, que quaut l'un des joyntenants lessa ceo que a luy affiert a un autre pur terme de sa vie, per tiel lease le franktenement est sever de le joynture. Et per mesme le reason le reversion que est dependant sur mesme le franktenement, est sever de le joynture. Auxy si le lessour ust reserve a luy un annuall rent sur le leas, le lessor solement averoit le rent, &c. le quel est un proove que le reversion est solement en luy, et que l'auter n'ad riens en cel reversion, &c. Auxy si le tenant a term de vie fuit impleade, &c. & fist default apres default, donques le lessor serroit de ceo solement receive a defender son droit, et son compaignon en cest case en nul manner serroit receive, le quel prove le reversion del moity d'estre tantsolement en le lessor: et sic per consequens, si le lessour morust vivant le lessee per terme de vie, le reversion discedra al heire de lessour, et nemy deviendra a l'auter joyntenant per le survivor, Ideo quære. Mes en cest case si celui joyntenant que ad le franktenement ad issue et devie, vivant le lessor & lessee, donques il semble, que mesme l'issue avera cest moitie en demesne, et en fee per discent, pur ceo que † un franktenement ne poet per nature*

which the lessor hath shall descend to the issue of the lessor, or that the other jointenant shall have this reversion by the survivor? Some have said in this case, that the other jointenant shall have this reversion by the survivor: and their reason is this, *scil.* That when the jointenants were jointly seised in fee simple, &c. although that the one of them make an estate of that to him belongeth for term of his life, and although that he hath severed the freehold of this which to him belongs by the lease, yet he hath not severed the fee simple, but the fee simple remains to them jointly as it was before. And so it seemeth to them, that the other jointenant which surviveth shall have the reversion by the survivor, &c. And others have said the contrary, and this is their reason, *scilicet*, that when one of the jointenants leaseth that to him belongeth, to another for term of his life, by such lease the freehold is severed from the jointure. And by the same reason the reversion which is depending upon the same freehold is severed from the jointure. Also if the lessor had reserved to him an annual rent upon the lease, the lessor onely should have had the rent, &c. the which is a proove, that the reversion is onely in him, and that the other hath nothing in the reversion, &c. Also if the tenant for term of life were impleaded, & maketh default after default, the lessor shall be only received for this, to defend his right, and his companion in this case in no manner shall be received, the which proveth the reversion of the moitie to be onely in the lessor: and so by consequent, if the lessor dieth living the lessee for term of life, the reversion shall descend to the heir of the lessor, and shall not come to the other jointenant

Cel reversion, ceo in L. and M. and Roh.

§ *En—de in L. and M. and Roh.*

¶ *So not in L. and M. or Roh.*

* *que added in L. and M. and Roh.*

† *us not in L. and M. or Roh.*

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de joynture estre annexe a un reversion, &c. Et il est certainne, que celui que lessa fait seisie de le moitie en son demesne come de fee, et nul avera aucun joynture en son franktenement, Ergo ceo descendra a son issue, &c. Sed quære.

tenant by the survivor, *Idco quære.* But in this case if that jointenant which hath the freehold hath issue, & dies living the lessor and the lessee, then it seemeth that the same issue shall have this moity in demesne, and in fee by descent, for that a freehold cannot by nature of joynture bee annexed to a reversion, &c. And it is certainne, that hee which leaseth was seised of the moitie in his demesne as of fee, and none shall have any joynture in his freehold, therefore this shall descend to his issue, &c. *Sed quære.*

“*SI deux joyntenants en fee, &c.*”
This needeth no explanation.

“*Et sur ceo case un question poct surder, &c.*”

Vid. 33. H. 6.
4. b.

[a] Vide Sect.
340. 375. 439,
440. 462, 463,
464. 482, 483.
648. 720. 729.
Vid. Sect. 170.

Here Littleton maketh a question, and sheweth the reasons on both sides, and concludes with a *Quære*. When Littleton maketh a question, and sheweth the reason on both sides, the latter is ever his owne, [a] and the better. But time hath made this question without question; for now all agree, that the joynture is severed for the time, according to the latter opinion here set down in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes an alteration or change of the reversion. As if tenant in taile, or the husband seised in the right of his wife, or tenant for life, make a lease for life of the lessee, in everie of these cases the lessour doth gaine a new reversion by wrong, as shall be said more at large in the chapter of Discontinuance; and if the elder brother grant the reversion (expectant upon a freehold) for life, it shall cause *possesso fratris*, as hath beene sayd.

Vid. Sect. 8.
7. H. 5.
(Ant. 15. a)

“*Per mesme le reason le reversion que est dependant sur mesme le franktenement est sever de le joynture, &c.*”

7. H. 7. 9.

(Ant. 189. b.)

If two joyntenants in fee be, and they both joyne in a lease to an abbot and a secular man for term of their lives, here the reversion that is dependant upon severall freeholds is severed. And so it is if they joine in a lease to two secular men, to have and to hold the one moity to the one for life, and the other moity to the other for life, for both these cases are warranted by the authority of Littleton. [192.]

(Post. Sect. 319.
199. a.)

If two joyntenants be of a lease for twenty one years, and the one of them letteth his part for certaine yeares, part of the terme, the joynture is severed, and survivor holdeth not place, for a terme for a small number of yeares is as high an interest as for many more years; and so was it resolved *Hil. 18. El. Regina, in Comuni Banco*, * which I myselfe heard.

* Hil. 18. Eliz.

If two coparceners be in fee, and the one make a lease for life, this is no severance of the coparcenary, for notwithstanding the lord shall make one avowrie upon them both.

(Ant. 167. a.)

But if two joyntenants be, and one maketh a lease for life, this is a severance of the joynture, as Littleton here taketh it, and severall avowries shall be made upon them (1).

“*Anxy*”

(1) [See Note 79.]

“ *Auxy si le lessor ust reserve un annual rent, le lessor seulement avera le rent, &c.*” But if two joyntenants make a lease for life, reserving a rent to one of them, the rent shall enure to them both, because the reversion remains in jointure, unless the reservation be by deed indented, and then he onely to whom it is reserved shall have it. But if they make a lease by deed indented, reserving or saving the reversion to one of them, that is void, because they had the reversion before, but the rent is newly created.

5. E. 4. 4. 2.
27. H. 8. 16. 2.
7. E. 4. 25.
14. Ed. 3.
Br. 282.
(Ant. 47. a.)
(Post. 214. a.)

And so it is if such a lessee for life should surrender to one of them, it shall enure to them both, for that they have a joynt reversion. But if the lessee grant his estate to one of them, no part of it shal enure to his companion, because for the moiety belonging to his companion, it is in *esse* in him to whom the grant is made, the reversion to the other in fee.

5. E. 4. 4.
(2 Rep. 66.
Post. 214. a.)

[192. b.]

If two joyntenants make a lease for life, the remainder to his companion in fee, this is a good remainder of his moitie to his companion.

(2. Cro. 611.
Perk 31.)

38. H. 6. 24. b.
2. R. 3. tit. Ex-
tinguishment 3.
(4. Leo. 187.)

“ *Donques le feoffor ferra de ceo seulement recevoir, &c.*”

“ *Receive,*” *Receit, Receptio*, is in many cases where a person, partie to a writ, or an estranger thereunto, to whom a reversion or remainder appertaineth, shall in default of another person be received to defend his or her freehold or inheritance, the law saith, *Admittatur, &c.* And this admission or receipt is given by sundry statutes (f) (and this is that which the civilians call, *Admissio tertie personæ pro interesse*). *Et in casibus prædictis duæ concurrunt actiones: una inter petentem & tenentem, & alia inter tenentem, ius suum ostendentem & petentem.*

(Post. 352. b.)

(f) W. 2. cap. 3.
20. E. 1. Statute
de defensione
Juris. 13. R. 2.
cap. 16.

“ *Pur ceo que un franktenement ne poet per nature de joynture, estre annexe a un reversion.*” And this is the principall reason, and of this sufficient hath beene said in the chapter of Joyntenants, Sect. 291.

“ *&c.*” This *&c.* in the end of this section, implieth any other heir lineal or collaterall.

[193. a.]

Sect. 303.

ME S si issint soit que la ley en cest cas est tiel, que si le lessor devie vivant le lessée, et vivant l'auter joyntenant que ad le franktenement de l'auter moitie, que le reversion descendra al issue del lessor, donque est le joynture et title que ascun de eux poit aver per le survivor, et le droit de le joynture anient, et tout ousterment defeat a tous jours. En mesme le maner est, si celuy joyntenant que ad le franktenement devie vivant le lessor et le lessée, si la ley soit

BUT if it be so that the law in this case bee such, that if the lessor die living the lessee, and living the other joyntenant which hath the freehold of the other moiety, that the reversion shall descend to the issue of the lessor, then is the joynture and title which any of them may have by the survivor, and the right of the joynture taken away, and altogether defeated for ever. In the same manner it is, if that joyntenant which hath the freehold

soit tiel que son franktenement et fee que il ad en le moitie descendra a son issue, donques le joynture serra defeat a tous jours.

freehold dye living the lessor and the lessee, if the law bee so as his freehold and fee which he hath in the moity shall descend to his issue, then the joynture shall be defeated for ever.

“**D**ONQUE est le joynture et title, &c. et le droit de le jointure anient, &c.”

[*] Vide Sect. 201.
(Post. 214. a.)

And the reason of this is, for if the joynture be severed at the time of the death of him that first deceased, the benefit of the survivor is utterly destroyed for ever, as hath beene said [*] afore in the Chapter of Joyntenants. But in the case aforesaid, if tenant for life dyeth in the life of both the joyntenants, they are joyntenants againe as they were before.

If two joyntenants be in fee, and the one letteth his part to another for the life of the lessor, and the lessor dieth, some say that his part shal survive to his companion, for by his death the lease was determined. And others hold the contrary; and their reason is, first, for that at the time of his death the joynture was severed, for so long as he lived the lease continued. And secondly, that notwithstanding the act of any one of the joyntenants there must bee equall benefit of survivor as to the freehold. But here if the other joyntenant had first died, there had been no benefit of survivor to the lessor without question.

Sect. 304.

ITEM, si trois joyntenants sont, et l'un releffa per son fait a un de ses companions tout le droit que il avoit en le terre, donques ad celuy a que le releas est fait, le tierce part de les terres per force de le dit releas, et il et son companion teigneront les auters deux parts * en joynture. Et quant al tierce part, que il ad per force de releas, il tient cel tierce part ove luy mesme et son companion en common.

AND, if three joyntenants be, and the one release by his deed to one of his companions all the right which he hath in the land (1), then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in joynture. And as to the third part, which he hath by force of the release, he holdeth that third part with himselfe and his companion in common.

(Post. 318. a.
6. Rep. 78. b.
Ant. 185. a.)

[*] 9. Eliz.
Dyer 263.

19. H. 6. 17.

[a] 40. E. 3. 41.

13. E. 3. tit.

Garr.

35. E. 3. release

43. 22 H. 6. 42.

14. E. 3.

3. H. 4. 8.

Briefe 28.

19. H. 6. 17.

33. H. 6. 5.

28. H. 6. 2.

37. H. 8.

Alienation 31.

UPON this case these two things are to be observed. First, that in this case this release doth enure by way of *mister p'estate*, and not [*] by way of extinguishment, for then the release should enure to his companion also, and he is in the *per* by him that maketh the release. [a] But if hee had released to the other two, then had it wrought no degree but in supposition of law, for many purposes they to whom the release is made (as hath beene said) shall bee supposed in from the first feoffor, as they shall de-

[193. b.]

* en jointure—jointment, in L. and M. and

(1) [See Note 20.]

Rob.

raigne the first warrantie for the whole. [b] The second thing to bee observed is, that he to whom the release is made hath a fee simple without this word (heires), as hath beene touched in the first chapter of the first booke, for that he to whom the release is, is seised *per my et per tout*, of the fee and inheritance, as hath been said in the Chapter of Joyntenants. And note, the like law is between coparceners: and further, if there be two coparceners, and the one hath issue twentie daughters and dieth, the other may release to any one of the daughters, her whole part, albeit she to whom the release is, hath not an equall part; but for the privitie and the individed estate, the release is good.

(Post. 385. a.)
[b] 9. Eliz.
Dyer 263.
19. H. 6. 17.
(Ante 9. b.)

But if two joyntenants be of twenty acres, and the one maketh a feoffment of his part in eightene acres, the other cannot release his entire part, but only in two acres, for that the joynture is severed for the residue.

Sect. 305.

E*T est asçavoir, que ascun foits + un releas prendra effect, et urera pur mitter l'estate de celuy que fist le releas a celuy a que le releas est fait, sicome en le cas avant dit, et auxy, sicome joynt estate soit fait a le baron et sa feme, et a la tierce person †, et la tierce person releffa tout son droit que il ad || a le baron, adonque ad le baron la moitie que le tierce avoit, et la feme de ceo n'ad riens. Et si en tiel case le tierce releffa § a la feme nient noismant le baron en le releas, donques ad la feme le moitie que le tierce avoit, &c. et le baron n'ad riens de ceo forsque en droit sa feme, pur ceo que en tiel case le release urera de faire estate a celuy a que le release est fait, de tout ceo que affiert a celuy que fait le release, &c.*

release shal enure to make an estate to whom the release is made, of all that which belongeth to him which maketh the release, &c.

AND it is to be observed, that sometimes a deed of release shal take effect, and enure to put the estate of him which makes the release to him to whom the release is made, as in the case aforesaid, and also, as if a joynt estate bee made to the husband and wife, and of a third person, and the third person release all his right which hee hath to the husband, then hath the husband the moitie which the third had, and the wife hath nothing of this. And if in such case the third release to the wife not naming the husband in the release, then hath the wife the moitie which the third had, &c. and the husband hath nothing of this but in right of his wife, because that in this case the re-

THIS is evident upon that which hath beene said before.

[c] And it is to bee understood, that a release may enure foure manner of wayes. First, by way of *mitter l'estate*, as here it appeareth. Secondly, by way of *mitter le droit*. Thirdly, by way of extinguishment. Fourthly, by way of creation or enlargement of an estate, as hereafter in this Chapter shall appeare. And it is to bee observed, that upon a release that creates or enlargeth an estate, or enures by way of *mitter l'estate*, a rent may bee reserved,

[c] 10. Eliz.
Bendloes.
9. Eliz. Dier
263.
(2. Roll. Abr.
403)
See more of this
in the Chapter
of Releases.
but (Post. 273. b.)
(Ant. 144. a.)

10. E. 4. 3. b. 21. H. 6. 8. b.

† *un fait est*, added in L. and M. and R.oh.

‡ *que* added in L. and M.

|| &c. added in L. and M. and R.oh.
§ &c. added in L. and M. and R.oh.

but not upon a release that enureth by way of *mitter le droit*, or which enures by way of extinguishment.

The (¶) in the end of this Section implieth a diversitie between a release which enures by way of *mitter l'estate* (whereof Littleton here speaketh) and a release that enures by way of extinguishment: for of a release enuring by way of extinguishment made to the husband, the wife shall take benefit, or to the wife, the husband shall take benefit, as hereafter shall more at large be said. [194. a.]

Sect. 306.

ET en aucun cas un releas urera de *mitter tout le droit que il que fait le releas ad a celui a que le releas est fait.* Sicome home seise de certain tenements est disseise per deux disseisors, si le disseisee per son fait releasa tout son droit, &c. a un des disseisors d'unque celui a que le releas est fait, avera et tiendra tous les tenements a luy seulement, et oustera son companion de chescun occupation de ceo. Et le cause est, pur ceo que les deux disseisors fueront eins * encounter la ley, et quant un de eux happe le releas de celui que ad droit d'entre, &c. cest droit en tiel cas † vestera en celui a que le releas est fait, et est en tiel plite, sicome ‡ il que avoit droit || avoit enter, et luy enseoffa &c. Et la cause est, pur ceo que il que avoit adevant estate per tort, scilicet, per disseisin, &c. ad ore per le releas un estate droiturel. §

AND in some case a release shall enure to put all the right which he who maketh the release hath to him to whom the release is made. As if a man seised of certaine tenements is disseised by two disseisors, if the disseisee by his deed release all his right, &c. to one of the disseisors, then hee to whom the release is made, shall have and hold al the tenements to him alone, and shal oust his companion of every occupation of this. And the reason is, for that the two disseisors were in against the law, and when one of them happeth the release of him which hath right of entry, &c. this right in such case shall vest in him to whom the release is made, and he is in like plite, as hee which hath the right had entred and enseoffed him, &c. And the reason is, for that he which before had an estate by wrong, scilicet, by disseisin, &c. hath now by the release a rightful estate.

(2. Roll. Abr. 409. 414. Post. 276. a.)

HERE Littleton pursueth the second part of his division, viz. where a release shall enure by way of *mitter le droit*.

“*Disseise per deux disseisors, &c.*” The like law is, where there bee two joynt abators or intruders which come in meere by wrong. But if two men doe usurpe by a wrongfull presentation to a church, and their clarke is admitted, instituted and inducted, and the rightfull patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in meere by wrong, but their clarke is in by admission, and institution, which are judiciall

* ses tenements per tort, per eux fait, added in L. and M. and Roh.

† vestera—est in L. and M. and Roh.

‡ il—il in L. and M. and Roh.

|| &c. added: *avoit enter, et*, not in L. and M. nor Roh.

§ &c. added in L. and M. and Roh.

ciall acts. (d) And therefore an usurpation shal worke a remitter to one that hath a former right.

(d) Fitz. N. B. 35. in 11. R. 2. quare Imp. 144. (1. Roll. Abr. 661, 662. Post. 368. a. Ant. 180. b. 181. a.)

[194. b.] “ *Donques celuy a que le release est fait avera et teignera tous les tenements, &c.*” Here by operation of law presently upon the deliverie of the release the whole freehold and inheritance is vested in him to whom the release is made, and al the state that the other disseisor had, wholly devested: for right and wrong cannot consist together, but the wrongfull estate giveth place to the rightfull. And the reason hereof is for that, as hath been said, the disseisor to whom the release was made was seised *per my et per tout*, whereunto when the right commeth it excludeth the wrong (e); for right which is lawfull, and wrong that is contrary to law, cannot stand together.

[e] Brit. fol. 116. 26. Aff. pl. 39. 39. E. 3. 29. 21. H. 6. 41. 22. H. 6. 22. 7. E. 4. 25. 9. E. 4. 6. 11. H. 7. 12. 20. H. 7. 5. 21. H. 7. 18. 12. E. 4. tit. Discontin. 1. 9. H. 6. 37. 21. H. 6. 32.

“ *En tiel plite, s'icome il que avoit droit avoit enter, et luy enseoffa, &c.*” This (&c.) doth implice that this is true *secundum quid* (1), but not *simpliciter* (2); for as to the holding out of the joynt disseisor, it amounts to as much as if he had entred and infeoffed him to whom the release is made, but it doth not amount to an entrie and feoffment *simpliciter* to all purposes, as shall be said hereafter in his proper place in the Chapter of Releases.

Sect. 307.

ET en ascun cas un releas urera per voy d'extinguishment, et en tiel case tiel releas aydera le joyntenant a que le release ne fuit fait, auxy bien come † luy a que le release fuit fait. S'icome ‡ un home soit disseisee, et le disseisor fait feoffment a deux homes en fee, § si ¶ le disseisee releffa per son fait a un de les feoffees, donques ¶ cel release urera a ambideux les feoffees, pur ceo que les feoffees ont estate per la ley, scilicet, per feoffment, et nemy per tort fait a nuluy, &c. (3)

AND in some case a release shall inure by way of extinguishment, and in such case such release shall aide the joyntenant to whom the release was not made, as well as him to whom the release was made. As if a man be disseised, and the disseisor makes a feoffment to two men in fee, if the disseisee release by his deed to one of the feoffees, this release shal enure to both the feoffees, for that the feoffees have an estate by the law, scilicet, by feoffment, and not by wrong done to any, &c.

HERE Littleton speaketh of the third kind of releases. And the reason of this diversitie (implied in the (&c.) in the end of this Section) between the disseisors and their feoffees, is for that the feoffees comming in by title and purchase, are intended in law to have a warrantie (which is much esteemed in law); and therefore

† luy—a celuy in L. and M. and Roh.

‡ si added in L. and M. but not in Roh.

§ si not in L. and M. nor Roh.

¶ et added in L. and M. and Roh.

¶ cel—tiel in L. and M. and Roh.

(1) i. e. in some respects;—as to some persons.

(2) i. e. absolutely.

(3) [See Note 81.]

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(f) 2. H. 3.
 Aff. 432. 1. Aff.
 13. 9. Aff. 15. 21.
 21. Aff. 28.
 27. Aff. 68. 32.
 29. Aff. 54.
 43. Aff. 17.
 40. E. 3. 24.
 50. E. 3. 21.
 3. R. 2. entry
 cong. 38. 13. E. 3. tit. Aff. 9. 12. Aff. 20.

fore lest the warrantie should be avoided, the release shall enure to both the feoffees in favour of purchasors, and so the right and benefit of every one saved. (f) And in ancient time if the disseisor had made a feoffment in fee, or a gift in taile, or a lease for life, and the feoffee, donee, or lessee had continued in seisin quietly a yeare and a day, the entrie of the disseisee had not been lawfull upon him; and the reason was, for the benefit and safeguard of the warrantie (which was intended by law) should have been destroyed by the entrie. But hereof also more shall be said in his proper place in the Chapter of Releases.

(2. Roll. Abr.
 400.)

Sect. 308.

EN mesme le maner est, si le disseisor fait un lease a un home pur terme de sa vie, le remainder ouster a un autre en fee, si le disseisee releffa a le tenant a terme de vie tout son droit, &c. cel release urera auxybien a celui en le remainder, come a le tenant a terme de vie. Et la cause est, pur ceo que le tenant a terme de vie vient a son estate per course de ley, et pur ceo cel release urera et prent effect per voy d'extinguishment de droit de celui que releffa, &c. Et per cel release le tenant a terme de vie n'ad plus ample ne greinder estate que il avoit devant le release fait a luy, et le droit celui que releffa est tout ousterment extinct. Et entant que cest release ne p'oit enlarge l'estate de le tenant a terme de vie, il est reason que cel release urera a celui en le remainder, &c.

Plus sera dit de releases en le Chapter de Releases.

IN the same manner it is, if the disseisor maketh a lease to a man for terme of his life, the remainder over to another in fee, if the disseisee release to the tenant for terme of life all his right, &c. this release shall inure as well to him in the remainder, as to the tenant for terme of life. And the reason is, for that the tenant for life commeth to his estate by course of law, and therefore this release shall enure and take effect by way of extinguishment of the right of him which releaseth, &c. And by this release the tenant for life hath no ampler nor greater estate than hee had before the release made him, and the right of him which releaseth is altogether extinct. And inasmuch as this release cannot enlarge the estate of the tenant for life, it is reason that this release shal enure to him in the remainder, &c. [19.]

More shall be said of releases in the Chapter of Releases,

“**C**EST release urera auxybien a celui en le remainder, come a le tenant a terme de vie, &c.” Of this and the rest of this Section, for avoyding of repetition, more shall be said in his proper place in the Chapter of Releases.

“**Tout son droit, &c.**” Here by this (&c.) is implied, title, demand, and other words which may transerre the right, &c. Also here is implied of in or to the land,

Sect.

Sect. 309.

ITEM, si soient deux parceners, et l'un alien ced que a luy affiert a un auter, donques l'auter parcener et l'alienee sont tenants en common.

ALSO, if two parceners be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

This is evident, and needeth no explication.

Sect. 310.

(Ant. 114. a.)

195. b.] **ITEM**, * nota, que tenaunts en common poient estre per + title de prescription, sicome l'un et ses aunces-tors, ou ceux que estate il ad en un moity ont tenus en common mesme le moitie ove l'auter tenant que ad l'auter moitie, et ove ses aunces-tors, ou ove ceux que estate il ad pro indiviso †, de temps dont memory ne curt, &c. Et divers auters manners poient faire et causer homes d'estre tenaunts en common, que ne sont icy expresses, || &c.

ALSO, note, that tenants in common may bee by title of prescription, as if the one and his ancestors, or they whose estate hee hath in one moitie have holden in common the same moitie with the other tenant which hath the other moitie, and with his ancestors, or with those whose estate he hath undivided, time out of minde of man. And divers other manners may make and cause men to be tenants in common, which are not here exprest, &c. (1)

OF this, besides Littleton, there is as good authoritie in law, as there is for all his other cases throughout his three bookes; but joyntenants cannot be by prescription, because there is survivor betweene them, but not betweene tenants in common.

11. E. 3. Trans.
212. 13. E. 5.
Briefe 674.
8. H. 6. 16. b.
lib. intrat. 23.

The two (&c.) in this Section are evident.

Sect. 311.

ITEM, en ascun cas tenants en common doyent aver de leur possession severaux actions, et en ascun cas ils joyndront en un action. Car si sont deux tenants en common, et ils sont disseisies, ils

ALSO, in some case tenants in common ought to have of their possession severall actions, and in some cases they shall joyne in one action. (2) For if two tenants in common be,

* nota que not in L. and M. nor Roh.

† title de not in Roh.

‡ &c. added in Roh.

|| &c. not in Roh.

(1) [See Note 82.]

(2) The reader will find what Littleton and his commentator say on this subject confirmed and exemplified by the cases cited in Viner and Bacon's Abridgments, and Comyn's Digest, under the proper Titles.

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ils doyent aver ‡ deux assises, et nemy un assise; car cheescun de eux covient aver un assise de son moitie, &c. Et la cause est, pur ceo que tenants en common fueront seifies, &c. per severalx titles. Mes auterment est de joyntenants; car si soyent vint joyntenants, et ils sont disseises, ils averont en tous lour nosmes forsque un assise, pur ceo que ils n'ont forsque un joynt title.

be, and they be disseised, they must have two assises, and not one assise; for each of them ought to have one assise of his moity, &c. And the reason is, for that the tenants in common were seised, &c. by severall titles. But otherwise it is of jointenants; for if twenty jointenants be, and they bee disseised, they shall have in al their names but one assise, because they have not but one joynt title.

(Post. 200. Cro.
Jac. 231.
Noy 13. Post.
Litt. Sect. 314.)

IN this Section wee learne two things: first, that in reall actions, and in actions also that are mixt with the personalty, tenants in common shall sever in action, because they have severall freeholds, and claime in by severall titles; and therefore as they shall bee severally by others impleaded, so shall they severally implead others in al real and mixt actions, unlesse it be in case of necessity for a thing entire, as hereafter in this Chapter shall appeare. And *Littleton* here putteth the case of the assise which is mixt with the personaltie, and therefore hee needeth not to put any case of any *præcipe quod reddat*; for if it bee so in case of assise, à *fortiori* in writs of higher nature, which is necessarily implied in the (&c.) Now of suits that sound in the realty, and of personall actions, *Littleton* speaketh hereafter in this Chapter. The second thing here to bee learned, is the diversitie betweene tenants in common and joyntenants, which both of it selfe, and upon that which hath been said, is apparant.

4. E. 4. 18. b.
(Ant. 180. b.)

(Noy 13. Ant.
193.)

Sect. 312.

[196. a.]

ITEM, si soient trois joyntenants, et un release a un de ses companions tout le droit que il ad, &c. et puis les * auters deux sont disseises de l'entiertie, &c. en cest case les deux auters averont ‡ severalx assises, &c. en cest forme, scilicet, ils averont en lour ambideux nosmes un assise de les deux parts, &c. pur ceo que les deux parts ils teignent jointment al temps de le disseisin. Et quant a le tierce part, celui a que le release fuit fait, covient aver de ceo un assise en son nosme demesne, pur ceo que ‡ il (quaunt a mesme le tierce part) est de ceo tenant in common, &c. pur ceo que

AL SO, if three joyntenants bee, and one release to one of his fellows all the right which hee hath, &c. and after the other two be disseised of the whole, &c. in this case the two others shall have severall assises, &c. in this manner, viz. they shall have in both their names an assise of the two parts, &c. because the two parts they held jointly at the time of the disseisin. And as to the third part, he to whom the release was made, ought to have of that an assise in his own name, for that hee (as to the same third part) is thereof tenant in

‡ envers le disseisor added in Roh,
* auters not in Roh.

‡ &c. added in Roh.
‡ il not in Roh.

que il vient a cel || tierce part per force del release, et nemy tantsolement per force del joynture.

in common, &c. because hee commeth to this third part by force of the release, and not only by force of the joynture.

This is put for an example (which ever doth illustrate the rule) and is evident of itselfe, and the (S.c.) in this Section needeth no further explication.

Sect. 313.

(Ant. 164. a.)
(S. Rep. 86. b.)

ITEM, quant a fuer des actions que touchant § le realty, y sont diversities perenter parceners que sont eins per divers descents, et tenaunts en common. Car si ¶ home seisie de certaine terre en fee ad issue deux ** files †† et morust, et les files entront, &c. et chescun de eux ad issue un fits, et devieront sauns partition fait enter eux, per que l'un moity descendist a le fits d'un parceners, et l'auter moitie descendist als fits d'auter parceners, et ils entront et occupient en common et sont disseisies, en cest case ils averont en leur deux nosmes un assise, et nemy deux assises. Et la cause est, que coment que ils veignent eins per divers descents, &c. uncore ils sont parceners, et brieve de partitione faciendà gist enter eux. Et ils ne sont parceners, cyant regarde ou respect tantsolement a * le seisin et possession de leur meres, mes ils sont parceners puis, eyant respect a l'estate que descendist de leur ayele a leur meres, car ils ne poyent estre parceners si leur meres ne fueront parceners adevant, † &c. Et issint a tiel respect et consideration, scilicet, quant a le primer descent que fuit a leur meres, ils ont un tittle en parcenarie, le quel fait eux parceners. Et auxy ils ne sont forsque come un heire a leur common auncestor, scilicet, a leur ayele, de que la terre descendist a leur meres.

Et

ALSO, to the suing of actions which touch the realty, there be diversities betweene parceners which are in by divers descents, and tenants in common. For if a man seised of certain land in fee hath issue two daughters and dyeth, and the daughters enter, &c. and each of them hath issue a sonne, and die without partition made between them, by which the one moity descends to the sonne of the one parceners, and the other moity descends to the sonne of the other parceners, and they enter and occupie in common and be disseised, in this case they shall have in their two names one assise, and not two assises. And the cause is, for that albeit they come in by divers descents, &c. yet they are parceners, and a writ of partition lieth betweene them. And they are not parceners, having regard or respect onely to the seisin and possession of their mothers, but they are parceners rather, having respect to the estate which descended from their grandfather to their mothers, for they cannot be parceners if their mothers were not parceners before, &c. And so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a tittle in parcenarie, the which makes them parceners.

|| tierce not in Roh.

§ en added in Roh.

¶ home—deux parceners in Roh.

** files—sies in Roh.

†† et morust, et les files entront, &c. et chescun de eux ad issue un fits, not in Roh.

* le -- leur in Roh.

† &c. not in Roh.

Lib. 3. Cap. 4. Of Tenants in Common. Sect. 314.

Et par ceux causes devant partition enter eux, &c. ils averont un assise, comment que ils veignant eins per severallx descents †.

And for these causes, before partition between them, &c. they shall have an assise, although they come in by severall descents.

(Ant. 164. a.)
Vid. Sect. 241.

This, upon that which hath beene said in the Chapter of Parceners, is evident: where you may reade excellent points of learning, and diversities concerning this matter; all which are here either expressed or implied, as the studious and diligent reader will observe.

Sect. 314.

ITEM, si sont deux tenants en common de certaine terre en fee, et ils donneront cel terre a un home en le taile, ou lesseront a un home pur terme de vie, rendant a eux annuellement un certaine rent, et un liver de pepper, et un esperver ou un chival, et ils sont seifies de cest service, et puis tout le rent est a derere, et ils distreigneront pur ceo, et le tenant a eux fait rescous. En cest cas quant a le rent et liver de pepper ils averont deux assises, et quant a l'esperver ou le chival forsque un assise. Et la cause pur que ils averont deux assises quant a le rent et liver de pepper est ceo, entant que ils fueront tenants en common en severall titles, et quant ils fieront un done en le tayle ou leas pur terme de vie, s'avant a eux le reversion, et rendant a eux certaine rent, &c. tiel reservation est incident a lour reversion; et pur ceo que lour reversion est en common, et per severall titles, sicome lour possession fuit devant le rent et auters choses que poient estre severes, et fueront a eux reserves sur le done, ou sur le leas, queux sont incidents per le ley a lour reversion, tiels choses issint reserves fueront de la nature del reversion. Et entant que le reversion est a eux en common per severall titles, il covient que le rent et le liver de pepper, queux poient estre severes, soyent a eux en common, et per severall titles.

Et

AL S O, if there bee two tenants in common of certaine land in fee, and they give this land to a man in taile, or let it to one for terme of life, rendring to them yearely a certaine rent, and a pound of pepper, and a hawke or a horse, and they bee seised of this service, and afterwards the whole rent is behind, and they distraine for this, and the tenant maketh rescouse. In this case as to the rent and pound of pepper they shall have two assises, and as to the hawke or the horse but one assise. And the reason why they shall have two assises as to the rent and pound of pepper is this, insomuch as they were tenants in common in severall titles, and when they made a gift in taile or lease for life, saving to them the reversion, and rendering to them a certaine rent, &c. such reservation is incident to their reversion; and for that their reversion is in common, and by severall titles, as their possession was before the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And in as much as the reversion is to them in common by severall titles,

† &c. added in Roh.

Et de ceo ils averont deux assises, et chescun de eux en son assise ferra son pleint de le moitie de le rent, et de le moitie del liver de pepper. Mes de l'esperver ou de chival, que ne poyent estre severes, ils averont forsque un assise, car home ne poit faire un pleint en assise de le moitie d'un esperver, ne de le moitie d'un chival, &c. En mesme le maner est d'auter rents et d'auter services que tenants en common ount en grosse per divers titles, &c.

hawke, nor of the moitie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in grosse by divers titles, &c.

EN cest case quant a le rent et liver de pepper, ils averont deux assises, et quaut a l'esperver ou le chival forsque un assise."

197. a.] But for the better understanding hereof it is to bee knowne, that if two tenants in common bee, and they grant a rent of 20 shillings per annum out of their land, the grantee shall have two rents of 20 shillings, for that every man's grant shall be taken most strongly against himselfe, and therefore they be several grants in law.

But if they two make a gift in taile, a lease for life, &c. reserving twenty shillings rent to them and their heires, they shall have but one 20 shillings, for they shall have no more then themselves reserved: and the donee or lessee shall pay but 20 shillings according to their own expresse reservation: and albeit the reservation of rents severable bee in joynt words, yet in respect of the several reversiones the law make thereof a severance. Now for the rent, as namely 20 shillings or a pound of pepper may bee severed, the one tenant in common may have an assise for the moity of 20 shillings, and the moitie of a pound of pepper, *de medietate unius libr' piperis*, but he cannot have an assise of ten shillings, or *de dimidio libræ piperis*. But for the hawke or horse, albeit they be tenants in common, they shall joyne in an assise, for otherwise they should bee without remedie, for one of them cannot make his plaint in assise of the moitie of a hawke, or of a horse, for the law will never suffer any man to demand any thing against the order of nature or reason, as before it appeareth by Littleton, Section 129. *Lex enim spectat naturæ ordinem*. Also the law will never enforce a man to demand that which he cannot recover, and a man cannot recover [1] the moytie of a hawke, horse, or of any other entire thing: *Lex neminem cogit ad vana, seu inutilia*. But in that case they shall joyne in an assise, and the reason is, *Ne curia Domini Regis deficeret in justitiâ exhibendâ*, or, *Lex non debet deficere conquerentibus in justitiâ exhibendâ*. And if they should not joyne, they should have *damnum et injuriam*, and yet should have no remedie (*) by law, which should be inconvenient, but the law will, that in every case where a man is wronged, and endammaged, that he shall have remedie. *Aliquid conceditur ne injuria remaneret impunita quod aliàs non concederetur*,

titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common, and by severall titles. And of this they shall have two assises, and each of them in his assise shall make his plaint of the moitie of the rent, and of the moitie of the pound of pepper. But of the hawke or of the horse, which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moitie of a

hawke, nor of the moitie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in grosse by divers titles, &c.

(Ante 147. b.)
Pl. Com. Hill.
& Granges case
171. Vide Sect.
219.

(5. Rep. 7. b.
Plowd. 289. b.)

(5. Rep. 111.
Ant. 148. b.)

Vide 16. Ass. pl.
1. 16. E. 3.
Joyndre en
action. 27.

Regula.
Vide Sect. 129.

[1] Lib. 5. fol.
21.

Regula.
(2. Cro. 159.
Ant. 137. a.
Hob. 43. 267.)
(*) 3. E. 3 19. a.
(1. Ro'l. Abr.
107. Noy 184.
Ant. 137.
2. Rep. 68.)

38. E. 3. 35.
Regula

And

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[m] 5. H. 7. 8.
13. E. 2. quare
imp. 170.
33. H. 6. 11.
6. E. 4. 10.
15. E. 3. darr.
presentment. 10.
[n] 6. H. 4. 6, 7.
45. E. 3. 10.
30. H. 6. Aff. 39.
18. E. 3. 56.
(Moor 184.
1. Roll. Rep.
243.)

[m] And tenants in common shall joyne in a *quare impedit*, because the presentation to the advowson is entire.

[n] Also tenants in common of a feigniory shall joyne in a writ of right of ward, and ravishment of ward for the bodie, because it is entire.

If two tenants in common be of the wardship of the bodie, and one doth ravish the ward, and the one tenant in common releases to the ravisher, this shall goe in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any barre to him. And so it is if two tenants in common be of an advowson, and they bring a *quare impedit*, and the one doth release, yet the other shall sue forth, and recover the whole presentment.

Two tenants in common shall joyne in a detinue of charters, and if the one be nonsuit, the other shall recover.

18. E. 3. 56.

It is said that tenants in common shall joyne in a *Warrantia Chartæ*, but sever in voucher.

“*Moitie de cheval, &c.*” Here is implied or any other entire rent or service.

“*Per divers titles, &c.*” That is by severall titles, and not by one joynt title, as hath beene said.

Sect. 315.

ITEM, quant al actions personals tenants en common averont tiels actions personals joyntment en tous leur nosmes, * sicome de trespas, ou † de offence que touche leur tenements en common, sicome de bruser ‡ leur measons, ¶ de enfreindre de leur closes, de pasture, degyster, et de fouler § des herbes, de couper leur bois, ** de pischer en leur pischarie, & hujusmodi. †† Et en cest cas tenants en common averont un action joyntment et recoveront jointment leur damages, pur ceo que l'action est en le personaltie, et nemy en le realtie, †† &c.

29. E. 3. 51.
43. E. 3. 24.
46. E. 3. 27.
5. H. 4. 3.
14. H. 4. 31.
3. H. 6. 57.

“**A**VERONT tiels actions personals joyntment en tous leur nosmes, [198. a.] &c.” By this it appeareth that tenants in common shall have personall actions joyntly. And it is to be observed, that where dammages are to be recovered for a wrong done to tenants in

* sicome—cest assavoir in Roh.

† de not in Roh.

‡ de added in Roh.

¶ de not in Roh.

§ des—de leur in Roh.

** et added in Roh.

†† et not in Roh.

†† &c. not in Roh.

in common, or parceners in a personall action, and one of them die, the survivor of them shall have the action; for albeit the property or estate be severall betweene them, yet (as it appeareth here by *Littleton*) the personall action is joynt.

21. H. 7. 22. 37. H. 6. 35. 21. E. 4. 12. (1. Sid. 157. Cro. Ja. 231. 2. Roll. Abr. 91. 10. Rep. 134. a.)

12. H. 6. 22.
22. H. 6. 14.
18. E. 4. 30.
2. R. 3. 16.
10. H. 7. 27.
1. Sid. 49.

“*Et hujusmodi.*” Hereby is implied a diversity between a chattle in possession, and a personall *chose* in action belonging unto them. As if two tenants in common be of land, and one doth a trespass therein, of this action they are jointenants, and the survivor shall hold place. So it is if two tenants in common be of a manor, and they make a bailife thereof, and one of them dieth, the survivor shall have the action of account, for the action given unto them for the arrerages upon the account was joint. So it is if two tenants in common sow their land, and one doth eate the same with his cattle, though they have the corne in common, yet the action given to them for trespass in the same is joynt, and shall survive. For the trespass and damage done to them was joynt, all which here is implied by *Littleton*, who saith, that they shall have an action jointly, and the same law is of coparceners.

Vide Sect. 319, 320, 321.

But if two tenants in common be of goods, as of an horse or of any other goods personall, there if one dye, his executors shall be tenant in common with the survivor.

(2. Cro. 19.)
22. H. 6. 12.
38. E. 3. 7.
13. E. 3. account 126.
45. E. 3. 13, 14.
37. H. 6. 32. 38.
(1. Noy 135.
2. Roll. Abr. 90.
Moor 40. 71.
667.)

Ant. 185.) 38. E. 3. 5. 17. E. 3. 11. 3. H. 5. Quare Imp. 71.
9. H. 6. 30. 22. H. 4. 14. 37. H. 6. 9. b. 10. Eliz. Dyer 279. F.N.B. 35.
Pl. Com. Seignior Barkley's case.

(Post. 200. a.
7. Rep. Hall's case sub fin.
10. Rep. 134.
14. H. 4. 12.
9. E. 3. 36, 37.

“*Et nemy en le realtie, &c.*” If two tenants in common be of an advowson, and a stranger usurpe, so as the right is turned to an action, and they bring a writ of *Quare impedit* which concernes the realtie, the fixe months passe, and the one dyeth, the writ shall not abate, but the survivor shall recover, otherwise there should be no remedie to redresse this wrong. And so it is of coparceners, and this is one exception out of our author's rule.

[a] But if three coparceners recover land and dammages in an assise of *Mordancester*, albeit the judgement be joynt, that they shall recover the land and dammages, yet the dammages being acccessory, though they bee personall, doe in judgement of law depend upon the freehold being the principal, which is severall. And though the words of the judgement be joint, yet shall it be taken for distributive. And therefore if two of them dye, the entire dammages doe not survive, but the third shall have execution according to her portion; and this is another exception out of our author's rule. But if all three had sued execution by force of an *Elegit*, and two of them had dyed, the third should have had the whole by survivor, till the whole damages be paid.

[a] 14. E. 3. Execution 75.
45. E. 3. 3. b.
(5. Rep. 7.
2. Roll. Abr. 86.
3. Rep. 14. b.
Ant. 154. b.
1. Roll. Abr. 888.)

If the aunt and niece join in an action of waste, for waste done in the life of the other sister, the aunt shall recover the dammages onely, because the same belongs not by law to the neice. And some hold the dammages in that case to be the principall.

45. E. 3. 3. b.
48. E. 3. 14.
11. H. 4. 16. b.
35. H. 6. 23. b.
11. E. 2. Waste.
Ant. 53. b.

115. 2. Cro. 19.

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(Cro. Jac. 231.
1. Sid. 49.)

Sect. 316.

ITEM, si deux tenants en common font un lease de leur tenements a un autre pur terme des ans, rendant a eux certaine rent annuellement durant le terme, si le rent soit aderere, &c. les tenants en common aureront un action de debt envers le lessee, et nemy divers actions, pur ceo que l'action est en la personalty.

AL S O, if two tenants in common make a lease of their tenements to another for terme of yeares, rendering to them a certaine rent yearly during the terme, if the rent bee behind, &c. the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty. [198. b.]

This upon that which hath been said is evident.

Sect. † 317.

MES en avowry pur le dit rent ils covient sever, car ceo est en le realtie, come le assise est supra.

BUT in an avowry for the said rent they ought to sever, for this is in the realty, as the assise is above.

Vid. 9. 3. 36, 37.
Pl. Com. Seignior Barkley's case.

This being an addition to *Littleton*, albeit it be consonant to law yet I omit it.

(Stat. 32. H. 8.
Ant. 167. a.
187. a.)

Sect. 318.

ITEM, tenants en common poyent bien faire partition enter eux s'ils voient, coment que ils † ne seront compelles de faire partition per la ley; mes s'ils font enter eux partition per leur agreement et consent, tiel partition est assés bone, come est adjudge en le liver d'assises ||.

AL S O, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition betweene themselves by their agreement and consent, such partition is good enough, as is adjudged in the booke of assises.

* Vid. Sect. 259.
290. 247. 264.
19. Aff. p. 1.
30. Aff. p. 8.
47. E. 3. 22.

Of this sufficient hath beene said in * the Chapter of Parceners and Joyntenants.

“En le liver d'assises.” This booke is of great authoritie in law, and is so called because it principally containeth the proceedings upon writs of assise of *novel disseisin*, which in those dayes was *festinum et frequens remedium*.

* la not in L. and M. nor Roh.
† No part of this Section in L. and M. nor Roh.

† ne not in Roh. but in L. and M.
|| &c. added in L. and M. and Roh.

Sect. 319.

ITEM, si come y sont tenants en common de terres et tenements, &c. come est avantdit, en mesme le manner y sont § de chattels reals et personals. Sicome ** lease soit fait de certaine terres a deux homes pur terme de 20 ans, et quant ils sont de ceo possessee l'un de les lesseees grant ceo que a luy affiert durant le terme a un auter, donque mesme celuy a que le grant est fait et l'auter tiendront et occuperont en common.

9. a.]

ALSO, as there bee tenants in common of lands and tenements, &c. as aforesaid, in the same manner there be of chattells reals and personals. As if a lease bee made of certaine lands to two men for terme of 20 yeares, and when they be of this possessed, the one of the lesseees grant that which to him belongeth to another during the terme, then hee to whom the grant is made and the other shall hold and occupie in common.

“**G**RANT ceo que a luy affiert.” The same law it is if the one lessee in this case make a lease for part of the terme, the second lessee and the other are tenants in common, as hath been said in the Chapter of Joyntenants. The (E.) in this Section, implyeth other hereditaments whereof men may be tenants in common, whereof sufficient hath beene said before.

Vid. Sect. 315.
(Cro. Eliz. 33-
Ant. 192. a.)

Sect. 320.

ITEM, si deux * ont † joyntment le garde de corps et de terre d'un enfant deins age, et l'un de eux granta a un auter ceo que a luy affiert de mesme le garde, donque le grantee, et l'auter que ne granta pas, averont et tiendront ceo en common, &c.

ALSO, if two have joyntly the wardship of the body and land of an infant within age, and the one of them grant to another that which to himselfe belongeth of the same ward, then the grantee, and the other which did not grant, shall have and hold this in common, &c.

HEREBY it appeareth, that there may bee tenants in common 16. E. 3. tit. Aid. as well of chattels reall entire, as wardship of the body, &c. as of chattels personal, as a hawke or a horse. If two tenants in common be of a seignory, and a ward fall, they are tenants in common of the wardship aswel of the body as land. And so it is if the land it selfe escheat to them, they shall be tenants in common thereof, and so it is of parceners.

“**E**n common, &c.” Here (E.) implyeth any other entire chattell. Vid. devant, Sect. 315.

§ possessions et proprietors added in L. and M. and Roh.

** si added in L. and M. and Roh.

[199. a.]

* joyntenants added in L. and M. and Roh.

† joyntment not in L. and M. nor Roh.

Sect. 321.

EN mesme le maner est de chateux personals. Sicome deux ont † joyntment per done ou per achate un chival ou boefe, &c. et l'un grant ceo que a luy affiert || de mesme le chival ou boefe a un auter, donques le grantee, et l'auter que ne granta pas, averont et possideront tiels chateux personals en common §. Et en tiels cases, ou divers persons ont chateux reals ou personals en common ¶, et per divers titres, si l'un de eux morust, les auters que survesquont n'avera ceo per le survivor, mes les executors celui que morust tiendront et occupieront ceo ovresque eux que survesquont, sicome leur testator fist ou devoit en sa vie, &c. pur ceo que leur titles et droits en ceo fueront severals, &c.

IN the same manner it is of chattels personals. As if two have joyntly by gift or by buying a horse or an ox, &c. and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And in such cases, where divers persons have chattels real or personall in common, and by divers titles, if the one of them dieth, the others which survive shal not have this as survivor, but the executors of him which dieth shall hold and occupie this with them which survive, as their testator did or ought to have done in his life time, &c. because that their titles and rights in this were severall, &c.

[199. b.]

Vid. devant,
Sect. 315.

This is evident enough, and hereof sufficient hath beene said before.

Sect. 322.

ITEM, en le case avantdit, sicome deux ont eslate en common pur terme d'ans, &c. l'un occupie tout, et mist l'auter hors de possession et occupation, &c. donques celui que est mise hors de occupation avera envers l'auter brieve de ejectione firmæ de la moitie, &c.

ALSO, in the case aforesayd, as if two have an estate in common for terme of yeares, &c. the one occupy all, and put the other out of possession and occupation, hee which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moitie, &c.

Sect. 323.

EN mesme le maner est leu deux teignent le gard des terres ou tenements durant le nonage d'un enfant, si l'un

IN the same manner it is where two hold the wardship of lands or tenements during the nonage of an enfant,

† joyntment—joint estate, in L. and M. and Roh.

¶ de mesme le, chival ou boefe not in L. and

M. nor Roh.

§ &c. added in L. and M. and Roh.

¶ &c. added in L. and M. and Roh.

*l'un ousta l'auter de son possession, il que est ouste avera brieve de ejectment de gard de le moitie, &c. pur ceo que ceux choses son chateaux realx, et poyent estre apporitions et severs, &c. Mes nul * action de trespas, c'estascavoir, Quare clausum suum fregit, et herbam suam, &c. conculcavit et consumpsit, &c. et hujusmodi actiones, &c. l'un ne poet aver envers l'auter, pur ceo que chescun de eux poet entrer et occupier en common, &c. per my et per tout, les terres et tenements § queux ils teignent en common. Mes si deux sont posses de chattels personalx en common per divers titles, sicome d'un cheval, ou boef, ou vache, &c. si l'un prent ceo tout a luy hors de possession d'auter, l'auter n'ad nul auter remedie mes de prender ceo de luy que ad fait luy le tort pur occupier en common, &c. quant † il poet veier son temps, &c. En mesme le manner est de chattels realx que ne poyent estre severs, sicome en le case avantdit, que deux sont possesse d'un gard de corps d'un enfant deins age, si l'un prent l'enfant hors de possession d'auter, l'auter n'ad aucun remedie per aucun action per la ley, mes de prendre l'enfant hors de le possession d'auter quaut il voit son temps †.*

fant, if the one oust the other of his possession, he which is ousted shal have a writ of *ejectment de gard* of the moitie, &c. because that these things are chattels reals, and may be apporitioned and severed, &c. but no action of trespass (*videlicet*) *Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c. et hujusmodi actiones, &c.* the one cannot have against the other, for that each of them may enter and occupie in common, &c. *per my et per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personalls in common by divers titles, as of a horse, an ox, or a cowe, &c. if the one take the whole to himselfe out of the possession of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, &c. when he can see his time, &c. In the same manner it is of chattels realls, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the bodie of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedie by an action by the law, but to take the infant out of the possession of the other when he sees his time.

“ *PUR terme de ans, &c.*” For one yeare, half a yeare, &c. (Sid. 49.)

“ *L'un occupie tout et mist l'auter hors de possession.*” These are words materially added, for albeit one tenant in common take the whole profits, the other hath no remedie by law against him, for the taking of the whole profits is no ejectment: (1) But if he drive out of the land any of the cattell of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have *ejectione firmæ*, for the one moitie, and recover damages for the entrie, but not for the meane profits. (Hob. 120. Flo. 247. Sid. 33. Mo. 123. 375.) (1. Roll. Abr. 741. Noy. 14.) (Cro. Jac. 611.)

“ *Ejectione firmæ de la moity, &c.*” Here by this and the other (2. Rep. 68. F. N. B. 197.) (3c.) in these two Sections, are to be understood divers diversities between

* *tiel* added in L. and M. and Roh.

§ *&c.* added in L. and M. and Roh.

† *il* not in L. and M. nor Roh.

‡ *&c.* added in L. and M. but not in Roh.

(1) [See Note 83.]

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between actions which concerne right and interest, (as of *ejectione firmæ*, *ejectment le gard*, *quare ejecit infra terminum* of a chattell real upon an expulsion or ejectment) and actions concerning the bare taking of the profits rising off the land or doing of trespassse upon the land, as here by the examples doe appeare, for the right is severall, and the taking of the profits in common. The second diversity is betweenne chattells reals that are apportionable or severable, as leases for yeares, wardship of lands, interest of tenements by *elegit*, statute merchant, staple, &c. of lands and tenements, and chattells reals entire, as wardship of the body, a villeine for yeares, &c. for if one tenant in common take away the ward, or the villeine, &c. the other hath no remedie by action, but he may take them againe. Another diversitie is betweenne chattells realls and chattells personalls, for if one tenant in common take all the chattells personalls, the other hath no remedie by action, but he may take them againe; and herein the like law is concerning chattells realls entire, and chattells personall for this purpose. But of chattells entire, as of a sheep, horse, or any other entire chattell, reall or personall, no survivor shall be betweenne them that hold them in common: and tenants in common shall not joyne in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c. for that these actions concerne the right of lands which are severall.

21. E. 4. 11. 22.
43. E. 3. 24.
45. E. 3. 13.
22. H. 6. 50. 58.
8. H. 6. 17.
19. H. 6. 57.
32. H. 6. 16.
2. E. 4. 23.
14. E. 4. 8.
18. E. 4. 30.
37. H. 6. 33.
21. E. 3. 29.
12. Aff. 28.
47. E. 3. 22. b.
10. H. 7. 16.
F. N. B. 117. a.
17. E. 2. Account 122.
(Ant. 198. a.)
10. H. 4.
Trespas 178.
11. H. 4. 3.
(Sir Tho. Ray.
15. 1. Lev. 29.)
21. E. 4. 11, 12. (Ant. Sec. 311. & fol. 197. b.)

If two tenants in common be of a manor, to the which waife and stray doth belong, a stray doth happen, they are tenants in common of the same, and if the one doth take the stray, the other hath no remedie by action, but to take him againe. But if by prescription the one is to have the first beast happening as a stray, and the other the second, there an action lieth if the one take that which pertaines to the other.

If two tenants in common be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespassse, *quare vi et armis columbare le pl' fregit et ducentas columbas pretij 40. s. interfecit, per quod volatum columbaris sui totaliter amisit*: for the whole flight is destroyed, and therefore hee cannot in barre plead tenancie in common. And so it is if two tenants in common bee of a parke, and one destroyeth all the deere, an action of trespassse lieth.

[c] If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carrie them away, the other shall have an action of trespassse *quare vi et armis* against him, in like manner as he shall have for the destruction of doves.

[d] If two tenants in common be of a folding, and the one of them disturbe the other to erect hurdles, he shall have an action of trespassse *quare vi et armis* for this disturbance.

[e] If two severall owners of houses have a river in common betweenne them, if one of them corrupt the river, the other shall have an action upon his case.

[f] If two tenants in common, or jointenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*; and the writ saith, *ad reparationem et sustentationem ejusdem domûs teneantur*; whereby it appeareth, that owners are

[200. a.]

[200. b.]

are in that case bound *pro bono publico* to mainetaine houses and mills which are for habitation and use of men.

If one jointenant or tenant in common of land maketh his companion his baylife of his part, he shall have an action of account against him, as hath bin said. But although one tenant in common or jointenant-without being made baylife take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, baylife, or receiver, as hath beene said before, which he cannot doe in this case, unlesse his companion constitute him his bailife. And therefore all those bookes which affirme that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when the one maketh the other his bailife, for otherwise never his baylife to render an account is a good plea.

If there be two tenants in common of a wood, turbarie, pisharie, or the like, and one of them doth wast against the will of his companion, his companion shall have an action of wast, and he that did the wast before judgement, hath election either to take his part in certaintie by the sherife and the oath of men, &c. or that he grant, that from thenceforth he shal not do wast but according to his portion, &c. and if he make choice of a certain place, then the place wasted shall be assigned to him. [g] But this extends not to coparceners, because they were compellable to make partition by the common law: and this, as it is said, doth extend as well to tenants in common and joyntenants for life, as to an estate of inheritance. But if one tenant in common, or joyntenant of a dovehouse destroy the whole flight of doves, no action of wast doth lie in that case upon the said statute, * as some doe hold.

If lands be given to two, and to the heires of one of them, and the tenant for life doth wast, he that hath the inheritance shall have no action of wast by the statute of *Gloucester*, but upon the statute of *W. 2.* he shall have an action of wast. And it is to be knowne, that one tenant in common may infeoffe his companion, but not release, because the freehold is severall. Jointenants may release, but not infeoffe, because the freehold is joynt; but coparceners may both infeoffe and release, because their seisin to some intents is joynt, and to some severall (1).

2. Roll. Abr. 86. 403. Ant. 186. b. Post. 335. a.)

17. E. 2. tit. Account 22.
8. E. 2. Account 115.
30. E. 1. Account 127.
45. E. 3. 10.
47. E. 3. 22. b.
38. E. 3. 9.
22. E. 3. 60.
3. E. 3. 27.
39. E. 27. 82.
F. N. B. 118. 1.
10. H. 7. 16.
2. E. 4. 25.
(Ant. 172. a.
F. N. B. 118.
1. Roll. Abr. 118.
2. Inst. 379.)
W. 3. ca. 23.

[g] 27. H. 8. 13.
21. E. 3. 29.
29. E. 3. 39.
3. E. 2. Wast. 35.
F. N. B. 59. d.
F. N. B. 49. i.

* 47. E. 3. 22.
50. E. 3. 3.

10. E. 4. 3. b.
22. H. 6. 42.
21. E. 3. 47.
17. E. 3. 47.
18. E. 4. 27.
28. E. 3. 4.
(2. Inst. 403.
11. Rep. 49.
Ant. 53. b.
F. N. B. 59. d.

Sect. 324.

ITEM, quant un home * voile monstrer un feoffement fait a luy, ou un done en le taile, ou un lease pur terme de vie d'ascun terres ou tenements, la il dirra, per force de quel feoffement, done, ou leas, il fuit seisie, &c. mes lou un voile pleade un leas ou grant fait a luy de

AL S O, when a man will shew a feoffement made to him, or a gift in taile, or a lease for life of any lands or tenements, ther he shal say, by force of which feoffement, gift, or lease, he was seised, &c. but where one will plead a lease or grant made to him

(1) [See Note 83†.]

* en pledaunt added in L. and M. and Roh.

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*de chattel real ou personal, la il dirra,
per force de quel il fuit possesse, &c.*

him of a chattell real or personal, ther
he shal say, by force of which he was
possessed, &c.

*Plus ferra dit de tenants en common
en le Chapter de Releases † et Tenant
per Elegit.*

More shall be said of tenants in
common in the Chapters of Releases
and Tenant by *Elegit*.

(Plowd. Com.
503. a.
Post. 303. a.
Plow. 149. b.
Post. 310. b.
Noy 26.)

“ *IL fuit seise, &c.*” *Seisin* is a word of art, and in pleading is
only applied to a freehold at least, as *posse* for distinction sake
is to a chattell reall or personall. As if *B.* plead a feoffement in
fee, he concludeth, *virtute cujus prædict.* *B. fuit seistus, &c.* But
if he plead a lease for yeares, he pleadeth, *virtute cujus prædictus*
B. intravit, et fuit inde possessionatus; and so of chattells personalls,
virtute cujus fuit inde possessionatus.

And this holdeth not only in case of lands or tenements which
lie in liverie, but also of rents, advowsons, commons, &c. and other
things that lie in grant, whereof a man hath an estate for life or
inheritance.

Also when a man pleads a lease for life, or any higher estate
which passeth by liverie, he is not to plead any entrie, for he is in
actuell seisin by the liverie it selfe. Otherwise it is of a lease for
yeares, because there he is not actually possessed untill an entrie.

† *et confirmations* added in L. and M. and Roh.

END OF THE FIRST VOLUME.

B. F. L. Bindery.
MAY 28 1909

